

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

REGULATORY LAWS ADMINISTERED BY THE

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(Including Court Decisions)



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PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered by the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for a hearing. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register.

The principal statutes concerned are the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), the Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151-158).

The decisions published herein are arranged alphabetically by statute and within the statute section by date of issue or date the decision became final after expiration of the appeal period. They may be cited by giving the volume and page, for illustration, 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D-578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

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In re: FLOYD UMPHLETT and REBBA UMPHLETT, respondents. I&G
Docket No. 82. Decided September 17, 1986.

Victor W. Palmer, Administrative Law Judge.

Robert Frisby, Mktg. Div., for complainant.

Pro se, for respondents.

CONSENT DECISION

This proceeding was instituted under the Agricultural Marketing Act of 1946, 7 U.S.C. §§ 1621-1627, and the regulations, 7 CFR §§ 51.1-51.6005, promulgated thereunder by a complaint filed by the Administrator, Agricultural Marketing Service, United States Department of Agriculture, alleging that the respondents knowingly and willfully violated the Act and the regulations promulgated under the Act by making fraudulent or unauthorized alterations on inspection notesheets and certificates prepared pursuant to the regulations promulgated under the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice Governing Withdrawal of Inspection and Grading Services, 7 CFR § 50.21.

The respondents admit the jurisdictional allegations of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Floyd Umphlett and Rebecca Umphlett, hereinafter referred to as the respondents, are individuals and their mailing address is 1428 Greenway Road, Suffolk, Virginia 23438.

2. Respondents, at all times material herein, were Virginia peanut buyers who applied for and received inspection and grading services pursuant to the regulations promulgated under the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

All grading and inspection services provided pursuant to the Agricultural Marketing Act of 1946 and the regulations promulgated thereunder are denied to respondents Floyd Umphlett and Rebecca

Umphlett, their agents and employees, to any firm, establishment or facility operated or managed by respondents, and to any firm, establishment or facility in which either of them serves as an owner, officer, or director, for a period of two (2) years from the effective date of this decision. During this two-year period, respondents shall not participate, directly or indirectly, in the operation or management of any firm, establishment or facility which receives grading and inspection services provided pursuant to the Act and the regulations.

The provisions of this order shall be effective from June 1, 1987, to May 31, 1989.

Copies of this decision shall be served upon the parties.

In re: PACKERLAND PACKING COMPANY and STEVEN C. DEMARAY.
A.Q. Docket No. 283. Decided September 8, 1986.

Victor W. Palmer, Administrative Law Judge.
Jaru Ruley, Reg. Div., for complainant.
Pro se, for respondent.

CONSENT DECISION AS TO PACKERLAND PACKING CO.

This proceeding was instituted under the Act of February 2, 1908, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondents violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Packerland Packing Company specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Packerland Packing Company, herein referred to as the respondent, is a corporation having a place of business at North 7th Street, P.O. Box 768, Gering, Nebraska 69341.

2. On or about the time period between June 1 and June 28, 1985, the respondent moved interstate various shipments of cattle from South Dakota, Montana, and Colorado, to Scottsbluff, Nebraska.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding with respect to respondent Packerland Packing Comany, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of five thousand five hundred dollars (\$5,500.00). The respondent shall send a certified check or money order for \$5,500.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: WAYNE J. BLASER. A.Q. Docket No. 246. Decided September 9, 1986.

Interstate cattle movement without certificate. Brucellosis prevention.

The Judicial Officer affirmed Judge Weber's order assessing civil penalties totalling \$2,000 against respondent for moving cattle interstate on four occasions that were not accompanied by a certificate, as required, in violation of the regulations governing the interstate movement of cattle to prevent the spread of brucellosis (9 CFR § 78.9(a)). Respondent's answer, which failed to deny or otherwise respond to the allegations of the complaint as to the violations, constitutes an admission of the allegations in the complaint and a waiver of hearing. Accordingly, the default decision was properly issued. Importance of Brucellosis Eradication Program explained.

Donald A. Campbell, Judicial Officer.

Clement McGovern, Reg. Div., for complainant.

Pro se, for respondent.

DECISION AND ORDER

This is an administrative proceeding for the assessment of civil penalties for violations of the regulations governing the interstate movement of cattle to prevent the spread of brucellosis (9 CFR §§ 71.18 and 78.1 *se seq.*). An initial Decision and Order was issued on June 24, 1986, by Administrative Law Judge William J. Weber (ALJ) assessing civil penalties totalling \$2,000.

On August 1, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR

§ 2.35).¹ The case was referred to the Judicial Officer for decision on August 28, 1986.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of cattle because of brucellosis (9 CFR §§ 71.18 and 78.1 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 CFR §§ 70.1 *et seq.* and 7 CFR §§ 1.130 *et seq.*

This proceeding was initiated by a complaint filed on March 12, 1986, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on four separate occasions the respondent moved cattle interstate from West Concord and Leroy, Minnesota, to Lake Mills, Iowa, in violation of section 78.9(a) of the regulations (9 CFR § 78.9(a)).

On or about the dates of May 17, 1985, July 1, 1985, and on two occasions during May and June of 1985, the respondent moved a total of 22 cattle interstate which were not accompanied by a certificate containing the prescribed information. In his answer to the complaint, the respondent admitted moving cattle from Leroy, Minnesota to Lake Mills, Iowa. The respondent also failed to respond to the alleged movement from West Concord, Minnesota to Lake Mills, Iowa.

The respondent's failure to deny or otherwise respond to the material allegations contained in the complaint is deemed an admission of such allegations and a waiver of hearing under the regulations (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint are adopted and set forth herein as the findings of fact, and this Deci-

¹ The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

sion is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (See 7 CFR § 1.139).

FINDINGS OF FACT

1. Wayne J. Blaser, herein referred to as the respondent, is an individual whose address is 806 N. 3rd Avenue East, Lake Mills, Iowa 50450.

2. On or about May, 1985, respondent moved interstate 10 cows from Leroy, Minnesota to Lake Mills, Iowa in violation of section 78.9(a) of the regulations (9 CFR § 78.9(a)), because the cows were not accompanied by a certificate, as required.

3. On or about May 17, 1985, respondent moved interstate 4 cows from West Concord, Minnesota to Lake Mills, Iowa in violation of the regulations (9 CFR § 78.9(a)), because the cows were not accompanied by a certificate, as required.

4. On or about June, 1985, respondent moved interstate one cow from Leroy, Minnesota to Lake Mills, Iowa in violation of section 78.9(a) of the regulations (9 CFR § 78.9(a)), because the cows were not accompanied by a certificate, as required.

5. On or about July 1, 1985, respondent moved interstate 7 cows from Leroy, Minnesota to Lake Mills, Iowa in violation of section 78.9(a) of the regulations (9 CFR § 78.9(a)), because the cows were not accompanied by a certificate, as required.

CONCLUSION

By reason of the facts contained in the findings of Fact above, the respondent has violated section 78.9(a) of the regulations (9 CFR 78.9(a)).

Therefore, the following Order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to deny or otherwise respond to the allegations of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 CFR §§ 1.136(a)-(c), .139, .141(a)):

§ 1.136 *Answer.*

(a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

(b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

* * * * *

§ 1.139 *Procedure upon failure to file an answer or admission of facts.*

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

* * * * *

§ 1.141 *Procedure for Hearing.*

(a) *Request for Hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

The complaint in this case contained allegations identical in all material respects to the findings of fact, *supra*, and advised respondent that complainant was seeking a \$2,000 civil penalty. The complaint advised respondent that failure to deny or otherwise respond to any allegation shall constitute an admission of such allegation, as follows (Complaint at 2):

WHEREFORE, it is hereby ordered that for the purpose of determining whether or not respondent has, in fact, violated the Act and regulations promulgated thereunder, this complaint shall be served upon the respondent. The respondent shall have twenty (20) days after receipt of this complaint in which to file answers with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-1400, in accordance with the applicable Rules of Practice (9 CFR § 70.1 and 7 CFR § 1.136). Failure to deny or otherwise respond to any allegation in this complaint shall constitute an admission of such allegation. Failure to file an answer within the time allowed therefor shall constitute an admission of the allegations in this complaint and a waiver of hearing.

In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent expressly advised respondent of the effect of failure to plead specifically to any allegation of the complaint. The letter states:

In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and *three* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny, or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Respondent's answer fails to request a hearing, does not deny the material allegations of fact relating to the movement from Le Roy, Minnesota, and ignores the allegations relating to the movement from West Concord, Minnesota. The answer states in its entirety:

I did move some cattle from my farm in LeRoy, MN. to Lake Mills, IA. I have lived on the state line all my life and did not give it a thought when I moved the cattle. We went from one half mile inside the Minnesota border to six miles across the Iowa border.

I have already paid a fine in the state of Iowa on one count. The others were thrown out because there were no dates. I was turned in a month after-the-fact. I had the cattle tested after they had been moved and they all tested OK.

I do not feel that there is sufficient reason to fine or charge me with this again.

Accordingly, under the plain provisions of the rules of practice, the default decision was properly issued.²

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and eco-

² See *In re Northwest Orient Airlines*, 45 Agric. Dec. ____ (Sept. 9, 1986); *In re Schwartz*, 45 Agric. Dec. ____ (Aug. 12, 1986); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. ____ (July 9, 1986); *In re Gutman*, 45 Agric. Dec. ____ (June 17, 1986); *In re Daul*, 45 Agric. Dec. ____ (Mar. 6, 1986); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. ____ (Sept. 23, 1985); *In re Cullone*, 44 Agric. Dec. ____ (Aug. 20, 1985), *appeal docketed*, No. 85-1591 (D.C. Cir. Sept. 19, 1985); *In re Corbett Farms, Inc.*, 43 Agric. Dec. ____ (Nov. 1, 1984); *In re Jacobson*, 43 Agric. Dec. ____ (June 26, 1984); *In re Buzun*, 43 Agric. Dec. ____ (June 13, 1984); *In re Mayer*, 43 Agric. Dec. ____ (Apr. 12, 1984) (decision as to respondent Doss), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. ____ (Jan. 4, 1984); *In re Berhow*, 42 Agric. Dec. 764 (1983), *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order not set aside where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order not set aside where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39 Agric. Dec. 370, 371 (1980); *In re Thomas-ton Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

nomical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 421 cases. The Department's Judicial Officer (who does not have a law clerk) disposed of 45 cases (including one on remand from the Seventh Circuit that required a 529-page decision to justify an 8-month suspension order and a \$10,000 civil penalty for 14 separate livestock violations based on circumstantial evidence). In a recent month, 66 new cases were filed with the Hearing Clerk. The Department does not have the time or resources to hold a hearing at this late date for this respondent, who did not contest the allegations of the complaint in his answer.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" ³ If respondent were permitted to contest some of the allegations of fact at this late date, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to present matters by way of defense at this time.

The civil penalties assessed here are modest considering the importance of the Brucellosis Eradication Program. As stated in *In re Grady*, 45 Agric. Dec. ____, slip op. at 67 (Jan. 31, 1986):

The brucellosis eradication program is important to the national welfare. To date, the program has cost in excess of \$1 billion. It costs about \$150 million a year (Tr. 440).

The Brucellosis Eradication Program is described in *In re Petty*, 43 Agric. Dec. ____, slip op. at 4-5 (Oct. 31, 1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986), as follows:

4. Brucellosis (also known as Bangs disease or undulant fever) is a contagious, infectious and communicable disease affecting livestock. It is transmittable to humans.⁴ (Tr. 32, 95-96, 1056-59, 1160-64, 1177-80). The incubation period of the disease varies from about 10 days to a year, but does not generally exceed several months (Tr. 95, 1180).

⁴ Brucellosis is "a disease of man of sudden or insidious onset and long duration characterized by great weakness, extreme exhaustion on slight effort, night sweats, chilliness, remittent fever, and generalized aches and

³ *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); accord *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962).

pains and acquired through direct contact with infected animals or animal products or from the consumption of milk, dairy products, or meat from infected animals" (Webster's Third New International Dictionary, Unabridged (1981), at 285)

For many years the Federal Government has maintained a vigorous and costly program directed to the control and eradication of this disease (Tr. 32-33, 1059-63). For example, in 1980, the Federal Government spent \$73,715,667 for brucellosis eradication (1982 Budget Explanatory Notes, USDA, vol. 2, at 8). To control the disease, some entire herds of cattle are destroyed, with some indemnification from the Federal Government (9 CFR § 51.3(a)(2) (1980); Tr. 239-41). Because of the large economic impact of the cattle industry on the nation, the success of the Brucellosis Eradication Program is of national importance.

In carrying out the Brucellosis Eradication Program, the Federal Government, through regulations issued by the United States Department of Agriculture, regulates the interstate movement of cattle. 9 CFR Part 78 (1980).

For the foregoing reasons, the following order should be issued in this proceeding.

ORDER

Respondent, Wayne J. Blaser, is hereby assessed a civil penalty of \$2,000, which shall be paid within 30 days after service of this order. This civil penalty shall be made payable to the "Treasurer of the United States," by certified check or money order, and shall be forwarded to Clement J. McGovern, Esq., U.S. Department of Agriculture, Office of the General Counsel, Room 2422, South Building, Washington, D.C. 20250-1400.

In re: BOB HUNTINGTON and DON HUNTINGTON. A.Q. Docket No. 272. Decided September 12, 1986.

Dorothea A. Baker, Administrative Law Judge
Clement McGovern, for complainant.
Pro se, for respondent.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint

filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondents violated the Act and regulations promulgated thereunder (CFR § 78.1 *et seq.*).

The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondents admit specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admit nor deny the remaining allegations in the complaint, admit to the Findings of Fact set forth below, and waive:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondents waive any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondents in connection with this proceeding.

FINDINGS OF FACT

1. Bob Huntington, herein referred to as a respondent, is an individual whose address is Route 1 Box 22, Chatfield, Minnesota 55923.

2. Don Huntington, herein referred to as a respondent, is an individual whose address is Riceville Sale Pavilion, Riceville, Iowa 50466.

3. On or about May 25, 1985, respondent Bob Huntington moved interstate 13 cattle from Ettrick, Wisconsin to Chatfield, Minnesota.

4. On or about May 25, 1985, respondent Don Huntington moved interstate 6 cattle from Chatfield, Minnesota to Riceville, Iowa.

5. On or about July 7, 1985, respondent Bob Huntington moved interstate 6 cattle from Chatfield, Minnesota to Riceville, Iowa.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of the proceeding, such Order and decision will be issued.

ORDER

Respondent Bob Huntington, is assessed a civil penalty of five hundred (\$500.00), and Respondent Don Huntington is assessed a civil penalty of two hundred and fifty dollars (\$250) which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Clement J. McGovern, Esq., Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Decision and Order.

This Decision and Order shall become effective on the day upon which service of this order is made upon the respondents.

In re: FRED WEBB. A.Q. Docket No. 180. Order issued September 26, 1986.

John A. Campbell, Administrative Law Judge.

Kevin Thiemann, for complainant.

Pro se, for respondent.

ORDER GRANTING MOTION TO DISMISS

On June 6, 1985, the Complainant filed a complaint against the Respondent with the Office of the Hearing Clerk. It has since been determined that formal adjudication will not be necessary in this matter in order to effectuate the purposes of the program. Therefore, the Complainant respectfully requests that the complaint herein be dismissed.

In re: ALAN RITCHEY. A.Q. Docket No. 277. Decided September 29, 1986.

Victor W. Palmer, Administrative Law Judge.

Clement McGovern, for complainant.

Pro se, for respondent.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 78.1 *et seq.*).

The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Alan Ritchey, herein referred to as a respondent, is an individual doing business as Alan Ritchey Trucking and whose address is Box 246, Valley View, Texas 76272.

2. On or about August 11, 1984, respondent moved interstate 38 cattle from Pilot Point, Texas to Yuba, Oklahoma.

3. On or about September 11, 1984, respondent moved interstate 37 cattle from Pilot Point, Texas to Yuba, Oklahoma.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of the proceeding, such Order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of one thousand (\$1,000.00), which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Clement J. McGovern, Esq., Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Decision and Order.

This Decision and Order shall become effective on the day upon which service of this order is made upon the respondent.

In re: J. MELVIN FARRAR, JOE H. PEOPLES, and RONALD B. PITCHFORD. A.Q. Docket No. 259. Decided October 17, 1986.

William J. Weber, Administrative Law Judge.

Robert Broussard, Reg. Div., for complainant.

Eldon F. Coffman, Fort Smith, AR, for respondents

CONSENT DECISION AS TO JOE H. PEOPLES

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (9 CFR § 71.1 *et seq.* and § 78.1 *et seq.*). The complainant and the respondent, Joe H. Peoples, have agreed that this proceeding should be terminated with respect to Joe H. Peoples by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Mr. Joe H. Peoples, respondent, is an individual whose address is Route 1, Box 196, Greenwood, Arkansas 72936.

2. On or about January 1, 1985, the respondent moved interstate approximately 24 cattle from Rock Island, Oklahoma to Greenwood, Arkansas.

3. On or about March 29, 1985, the respondent moved interstate approximately 24 cattle from Greenwood, Arkansas to Rock Island, Oklahoma.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of one thousand dollars (\$1,000.00), payable to the "Treasurer of the United States," by certified check or money order to be mailed to USDA, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403, within thirty (30) days from the effective date of this order. The certified check or money order should include the docket number of this proceeding.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: J. MELVIN FARRAR, JOE H. PEOPLES, and RONALD B. PITCHFORD. A.Q. Docket No. 259. Order issued October 17, 1986.

William J. Weber, Administrative Law Judge.

ORDER DISMISSING COMPLAINT AS TO J. MELVIN FARRAR

On complainant's Motion to Dismiss the Complaint insofar as it pertains to respondent J. Melvin Farrar, the complaint should be and hereby is dismissed without prejudice.

In re: RANDALL J. MOORE. A.Q. Docket No. 207. Decided September 5, 1986.

William J. Weber, Administrative Law Judge.

Sally Shatmoen, for complainant.

Aaron Frank McGee, Eunice, Louisiana, for respondent.

DECISION AND ORDER

Respondent is charged with moving nine (9) brucellosis reactor cattle and fourteen (14) brucellosis-exposed cattle in interstate commerce without required documentation in violation of certain statutory and regulatory requirements.¹

The evidence establishes these violations occurred as charged.

FINDINGS AND CONCLUSIONS

1. Randall J. Moore, respondent herein, is an individual whose address is Route 2, Box 714, Eunice, Louisiana 70535.

2.(a) Respondent Moore directed that nine (9) brucellosis reactor cattle be moved interstate from Lake Charles, Louisiana, to Lufkin, Texas on or about September 27, 1984.

(b) The interstate movement of these nine (9) brucellosis reactor cattle was in violation of § 78.7 of the regulations (9 CFR 78.7) because the cattle were not accompanied by the required permit.

3.(a) Respondent Moore also directed that thirteen (13) brucellosis-exposed cattle be moved interstate from Lake Charles, Louisiana to Lufkin, Texas about September 27, 1984.

(b) The interstate movement of these thirteen (13) brucellosis-exposed cattle was in violation of § 78.8 of the regulations because the cattle were not accompanied by the VS form 1-27 permit or "S" brand permit.

4.(a) The cattle in this shipment were not "steers and spayed heifers" which could be moved interstate without documentation. (9 CFR § 78.6)

(b) The cattle in this shipment were all brucellosis reactor or brucellosis-exposed cattle subject to the regulatory restrictions under § 78.7 and § 78.8. (9 CFR § 78.7 and § 78.8)

DISCUSSION

The evidence substantiates the charges in the complaint that the respondent violated the regulations. The respondent is an experienced cattle dealer and aware of the requirements for the interstate movement of cattle.

¹ Act of February 2, 1903 as amended (Act), 21 U.S.C. 111 and 120, and implementing regulations 9 CFR 78.1, *et. seq.*, in particular § 78.7 and § 78.8.

The evidence establishes that the cattle were diseased with (or exposed to) brucellosis, which is highly communicable and contagious, not only to cattle, but also to people, causing undulant fever. Brucellosis is not only a problem for the cattle industry, it is a public health problem.

The Department is involved in a brucellosis eradication program. The program is based, in part, on the ability to monitor and trace the interstate movement of cattle. The respondent's movement of the cattle without proper documentation thwarted that program. A "paper trail" is vital.

The cattle here were all handled as brucellosis reactor or exposed cattle, and tagged or branded accordingly. In fact, respondent admits in his answer that the "cattle were either brucellosis reactor or were brucellosis-exposed cattle, and as such, appropriate instructions" were given by respondent for their shipment. (Paragraph 5 of respondent's Answer)

Respondent contended that errors occurred in the preparation and handling of the permits, and that they were neither his fault nor his responsibility.

To the contrary, the picture is clear that respondent is indifferent to his obligations in handling diseased (or potentially diseased) cattle. Further, respondent's testimony is not persuasive and is of doubtful credibility in his description of "stack[s]" of permits (VS 1-27) lying weeks without concern at the sales barn. (TR p. 131)

On brief, respondent argues that there was no proof that the subject cattle were not "steers and spayed heifers" exempted by § 78.6 (9 CFR § 78.6) from the shipment restrictions applied here.

Neither the pleadings nor the evidence offer any support for respondent's argument. No questions existed concerning the status of the cattle as subject to § 78.7 and § 78.8 until the post-trial brief.

Complainant has sustained the burden of proof on that and all other points. Testimony and documentation provided by complainant is persuasive. The respondent's alternative and contradictory defenses are each without merit. Finally, respondent's credibility was not worthy of much weight.

The sanction sought by complainant is warranted and appropriate. Complainant gave appropriate consideration to the fact that the cattle were promptly slaughtered and therefore, the risk of spreading the disease was minimized.

ORDER

Randall J. Moore, respondent, is assessed a civil penalty of one thousand dollars (\$1,000). The civil penalty shall be payable to, "The Treasurer of the United States", by certified check or money

order and shall be forwarded to the Assistant General Counsel, Regulatory Division, Office of the General Counsel, Room 2422-South Building, U.S. Department of Agriculture, Washington, D.C. 20250-1400. This civil penalty shall be paid not later than six (6) months from the date this Decision and Order become final.

This Decision and Order shall be final and effective 35 days after service hereof, unless appealed to the Judicial Officer within 30 days of service (7 CFR § 1.142(c) and § 1.145(a)).

[The Decision and Order became final on October 20, 1986.—Ed.]

In re: J.W. GUFFY A.Q. Docket No. 234. Decided October 20, 1986.

Interstate cattle movement without certificate. Brucellosis prevention.

The Judicial Officer affirmed Chief Judge Campbell's order assessing civil penalties totalling \$2,000 against respondent for moving seven cattle interstate without a certificate or a permit for entry, as required under the regulations governing the interstate movement of cattle because of brucellosis. Respondent's answer was filed after the 20-day time limit, did not deny the allegations of the complaint and did not request a hearing. Accordingly, a default decision was properly issued. Importance of Brucellosis Eradication Program explained. Even if respondent's answer had been timely filed, respondent argues only that he signed a statement admitting that he was in technical violation of the regulations after he was assured that the matter would end at that point. However, even if equitable estoppel would be applicable to those facts if private litigants were involved, it does not apply to the exercise of the Secretary's disciplinary authority under regulatory statutes.

Donald A. Campbell, Judicial Officer.

Clement McGovern, for complainant.

Jim Short, Salem, Arkansas, for respondent

DECISION AND ORDER

This is an administrative proceeding for the assessment of civil penalties for violations of the regulations governing the interstate movement of cattle to prevent the spread of brucellosis (9 CFR § 78.1 *et seq.*). An initial Decision and Order was issued on July 7, 1986, by Chief Administrative Law Judge John A. Campbell (ALJ) assessing civil penalties totalling \$2,000.

On August 11, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).¹ The case was referred to the Judicial Officer for decision on September 19, 1986.

¹ The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, with trivial changes. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of cattle because of brucellosis (9 CFR § 78.1 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 CFR § 70.1 *et seq.* and 7 CFR § 1.130 *et seq.*

This proceeding was initiated by a complaint filed on February 6, 1986, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent transported cattle interstate from Salem, Arkansas, to Memphis, Tennessee, in violation of section 78.9(d)(3)(iii) and 78.9(d)(3)(iv) of the regulations (9 CFR § 78.9(d)(3)(iii) and 78.9(d)(3)(iv)). On or about June 11, 1985, the respondent moved seven (7) cattle interstate without a certificate or a permit for entry which contained the prescribed information. The respondent filed a late response to the complaint, and failed to deny or otherwise respond to any of the material allegations contained in the complaint. Therefore, for the purposes of this proceeding, the allegations in the complaint are deemed to have been admitted and the right to a hearing is deemed waived. (See 7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint are adopted and set forth herein as the Findings of Fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (See 7 CFR § 1.139).

FINDINGS OF FACT

I

J. W. Guffy, herein referred to as the respondent, is an individual whose address is Route 2, Box 141, Viola, Arkansas 72583.

3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

II

On or about June 11, 1985, the respondent moved interstate six cattle from Salem, Arkansas, to Memphis, Tennessee, in violation of section 78.9(d)(3)(iii) of the regulations (9 CFR § 78.9(d)(3)(iii)), in that the six cattle were not accompanied by a certificate, as required.

III

On or about June 11, 1985, the respondent moved interstate six cattle, from Salem, Arkansas, to Memphis, Tennessee, in violation of section 78.9(d)(3)(iii) of the regulations (9 CFR § 78.9(d)(3)(iii)), in that the six cattle were not accompanied by a permit for entry, as required.

IV

On or about June 11, 1985, the respondent moved one cow, which was two years of age or older, from Salem, Arkansas, to Memphis, Tennessee, in violation of section 78.9(d)(3)(iv) of the regulations (9 CFR § 78.9(d)(3)(iv)), in that the cow was not accompanied by a certificate, as required.

V

On or about June 11, 1985, the respondent moved a cow, which was two years of age or older, from Salem, Arkansas, to Memphis, Tennessee, in violation of section 78.9(d)(3)(iv) of the regulations (9 CFR § 78.9(d)(3)(iv)), in that the cow was not accompanied by a permit for entry, as required.

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated section 78.9(d)(3)(iii) and (iv) of the regulations (9 CFR § 78.9(d)(3)(iii) and (iv)).

Therefore, the following order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to file an answer with the Hearing Clerk within 20 days after service of the complaint, or a respondent's failure to deny or otherwise respond to the allegations of the complaint, constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 CFR §§ 1.136(a)-(c), .139, .141(a)):

§ 1.136 *Answer.*

(a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

(b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

* * * * *

§ 1.139 *Procedure upon failure to file an answer or admission of facts.*

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objec-

tions are not filed, the Judge shall issue a decision without further procedure or hearing.

* * * * *

§ 1.141 *Procedure for Hearing.*

(a) *Request for Hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

The complaint in this case contained allegations identical in all material respects to the findings of fact, *supra*, and advised respondent that complainant was seeking a \$2,000 civil penalty. The complaint advised respondent that an answer must be filed with the Hearing Clerk within 20 days, and that failure to deny or otherwise respond to any allegation shall constitute an admission of such allegation, as follows (Complaint at 2):

WHEREFORE, it is hereby ordered that for the purpose of determining whether or not respondent has, in fact, violated the Act and regulations promulgated thereunder, this complaint shall be served upon the respondent. The respondent shall have twenty (20) days after receipt of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250, in accordance with the applicable Rules of Practice (9 CFR § 70.1 and 7 CFR § 1.136). Failure to deny or otherwise respond to any allegation in this complaint shall constitute an admission of such allegation. Failure to file an answer within the time allowed therefor shall constitute an admission of the allegations in this complaint and a waiver of hearing.

In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent expressly advised respondent of the effect of failure to file an answer with the Hearing Clerk within 20 days, or failure to plead specifically to any allegation of the complaint. The letter states:

In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which

to file with the Hearing Clerk an original and *three* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny, or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Respondent's answer was filed 10 days after the 20-day period permitted by the rules of practice, fails to request a hearing, and does not deny the allegations of the complaint. Accordingly, under the plain provisions of the rules of practice, the default decision was properly issued.²

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 421 cases. The Department's Judicial Officer (who does not have a law clerk) disposed of 45 cases (including one on remand from the Seventh Circuit that required a 529-page decision to justify an 8-month suspension order and a \$10,000 civil penalty for 14 separate livestock vio-

² See *In re Blaser*, 45 Agric. Dec. ____ (Sept. 9, 1986); *In re Northwest Orient Airlines*, 45 Agric. Dec. ____ (Sept. 9, 1986); *In re Schwartz*, 45 Agric. Dec. ____ (Aug. 12, 1986); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. ____ (July 9, 1986); *In re Gutman*, 45 Agric. Dec. ____ (June 17, 1986); *In re Daul*, 45 Agric. Dec. ____ (Mar. 6, 1986); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. ____ (Sept. 23, 1985); *In re Cultone*, 44 Agric. Dec. ____ (Aug. 20, 1985), *appeal docketed*, No. 85-1591 (D.C. Cir. Sept. 19, 1985); *In re Corbett Farms, Inc.*, 43 Agric. Dec. ____ (Nov. 1, 1984); *In re Jacobson*, 43 Agric. Dec. ____ (June 26, 1984); *In re Buzun*, 43 Agric. Dec. ____ (June 13, 1984); *In re Mayer*, 43 Agric. Dec. ____ (Apr. 12, 1984) (decision as to respondent Doss), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. ____ (Jan. 4, 1984); *In re Berhow*, 42 Agric. Dec. 764 (1983); *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order not set aside where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order not set aside where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39 Agric. Dec. 370, 371 (1980); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondent's contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

lations based on circumstantial evidence). In a recent month, 66 new cases were filed with the Hearing Clerk. The Department does not have the time or resources to hold a hearing at this late date for this respondent, who did not contest the allegations of the complaint in his answer.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" ³ If respondent were permitted to contest some of the allegations of fact at this late date, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to present matters by way of defense at this time.

The civil penalties assessed here are modest considering the importance of the Brucellosis Eradication Program. As stated in *In re Grady*, 45 Agric. Dec. —, slip op. at 67 (Jan. 31, 1986):

The brucellosis eradication program is important to the national welfare. To date, the program has cost in excess of \$1 billion. It costs about \$150 million a year (Tr. 440).

The Brucellosis Eradication Program is described in *In re Petty*, 43 Agric. Dec. —, slip op. at 4-5 (Oct. 31, 1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986), as follows:

4. Brucellosis (also known as Bangs disease or undulant fever) is a contagious, infectious and communicable disease affecting livestock. It is transmittable to humans.⁴ (Tr. 32, 95-96, 1056-59, 1160-64, 1177-80). The incubation period of the disease varies from about 10 days to a year, but does not generally exceed several months (Tr. 95, 1180).

⁴ Brucellosis is "a disease of man of sudden or insidious onset and long duration characterized by great weakness, extreme exhaustion on slight effort, night sweats, chilliness, remittent fever, and generalized aches and pains and acquired through direct contact with infected animals or animal products or from the consumption of milk, dairy products, or meat from infected animals" (Webster's Third New International Dictionary, Unabridged (1981), at 285).

For many years the Federal Government has maintained a vigorous and costly program directed to the con-

³ *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); *accord Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962).

trol and eradication of this disease (Tr. 32-33, 1059-63). For example, in 1980, the Federal Government spent \$73,715,667 for brucellosis eradication (1982 Budget Explanatory Notes, USDA, vol. 2, at 8). To control the disease, some entire herds of cattle are destroyed, with some indemnification from the Federal Government (9 CFR § 51.3(a)(2) (1980); Tr. 239-41). Because of the large economic impact of the cattle industry on the nation, the success of the Brucellosis Eradication Program is of national importance.

In carrying out the Brucellosis Eradication Program, the Federal Government, through regulations issued by the United States Department of Agriculture, regulates the interstate movement of cattle. 9 CFR Part 78 (1980).

In addition, even in respondent's appeal, respondent does not challenge the allegations of fact contained in the findings of fact herein, which are virtually identical to those alleged in the complaint. Instead, respondent contends that he signed a statement admitting that he was in technical violation of the regulations because he was assured that the matter would end at that point if he signed the statement. However, the statement referred to by respondent is not part of the record in this proceeding and is totally irrelevant to the issues involved on this appeal. In addition, even if the matter had proceeded to a hearing, there is no way of knowing whether the statement would have been offered in evidence by complainant. Furthermore, it has consistently been held that even if the facts would make equitable estoppel applicable if private litigants were involved, it does not apply to the exercise of the Secretary's disciplinary authority under the Department's regulatory statutes. E.g., *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1144-46 (1982), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re Ruster*, 41 Agric. Dec. 845, 855-57 (1982); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1210 (1979) (remand order), *final decision*, 40 Agric. Dec. 736 (1981); *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 396-98 (1979), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 760-61 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977). In the *M. & H.* case, just cited, it is stated (34 Agric. Dec. at 760-61):

Even if we were to assume that the facts in this case presented a case for equitable estoppel, I adhere to the traditional view that equitable estoppel does not apply to the Government acting in its sovereign capacity.

As stated in *United States v. Georgia-Pacific Company*, 421 F.2d 92, 100-101 (C.A. 9):²⁵

²⁵ See also *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383-386; Davis, *Administrative Law Treatise* (1958 ed. and 1970 supp.), §§ 17.01-17.04.

Numerous cases reflect the position that equitable estoppels may be found against the Government in certain situations. Thus the courts have held that an equitable estoppel may be found against the Government (1) if the Government is acting in its proprietary rather than sovereign capacity; and (2) if its representative has been acting within the scope of his authority.

(1) While it is said that the Government can be estopped in its proprietary role, but not in its sovereign role, the authorities are not clear about just what activities are encompassed by each. In its proprietary role, the Government is acting as a private concern would; in its sovereign role, the Government is carrying out its unique governmental functions for the benefit of the whole public.

Similarly, in *United States v. State of Florida*, 482 F.2d 205, 209 (C.A. 5), the Court stated:

Whether the defense of estoppel may be asserted against the United States in actions instituted by it depends upon whether such actions arise out of transactions entered into in its proprietary capacity or contract relationships, or whether the actions arise out of the exercise of its powers of government. The United States is not subject to an estoppel which impedes the exercise of the powers of government, and is not estopped to deny the validity of a transaction or agreement which the law does not sanction. *Sanitary Dist. v. United States*, 266 U.S. 405, 45 S. Ct. 176, 69 L. Ed. 352 (1925); *Utah Power & L. Co. v. United States*, 243 U.S. 389, 37 S. Ct. 387, 61 L. Ed. 791 (1916). Nor does an estoppel arise through an act or representation made by an officer or agent without authority to act for the government in the premises. *Wilber Nat. Bank v. United States*, 294 U.S. 120, 55 S. Ct. 362, 79 L. Ed. 798 (1935); *Jeems Bayou*

Fishing & Hunting Club v. United States, 260 U.S. 561, 43 S. Ct. 205, 67 L. Ed. 402 (1922).

There is, however, some support for the view that in recent years, "the doctrine of sovereign immunity has begun to crumble, and so have the rules insulating the government from estoppel." *Gestuvo v. District Dir. of U.S. Immigration & Nat. Serv.*, 337 F. Supp. 1093, 1098 (C.D. Cal. 1971). It has been said that estoppel now "hinges on only two considerations: estoppel is available if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel" (*id.*, at 1099). See, also, *United States v. Lazy FC Ranch*, 481 F.2d 985, 989 (C.A. 9), in which the Court said that—

estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel. *Gestuvo v. District Dir. of I.N.S.*, 337 F. Supp. 1093 (C.D. Cal. 1971). This proposition is true even if the government is acting in a capacity that has traditionally been described as sovereign (as distinguished from proprietary) although we may be more reluctant to estop the government when it is acting in this capacity. See *Georgia-Pacific, supra*.

I believe that the older, traditional view best protects the public interest and should be adhered to. I would deal with wrongful conduct by Government employees through disciplinary actions, if their conduct warrants punishment, rather than by damaging the public interest to any degree.

But even if we were to apply the test set forth in the *Gestuvo* and *Lazy FC Ranch* cases, *supra*, the public interest would be "unduly damaged" by the imposition of estoppel here.

Here as in the *M. & H.* case, just quoted, even if equitable estoppel could be applicable to this proceeding in which the Government is acting in its sovereign role rather than its proprietary role, (i) respondent's appeal fails to show any serious injustice, and (ii) the public interest would be "unduly damaged" if the Secretary were estopped from issuing an appropriate disciplinary order here, which is needed to serve as an effective deterrent to future violations by respondent and other potential violators.

For the foregoing reasons, the following order should be issued in this proceeding.

ORDER

Respondent, J. W. Guffy, is hereby assessed a civil penalty of \$2,000, which shall be paid within 30 days after service of this order. This civil penalty shall be made payable to the "Treasurer of the United States," by certified check or money order, and shall be forwarded to Clement J. McGovern, Esq., U.S. Department of Agriculture, Office of the General Counsel, Room 2422, South Building, Washington, D.C., 20250-1400.

In re: LADNER FARMS. A.Q. Docket No. 273. Decided October 28, 1986.

Victor W. Palmer, Administrative Law Judge.

Kevin Thiemann, for complainant.

Richard Fitzpatrick, Poplarville, Miss., for respondent.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Ladner Farms, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act

of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Ladner Farms, respondent, is a business whose address is Route 4, Box 271, Poplarville, Mississippi 39470.

2. On or about September 19, 1984, the respondent moved three (3) cows interstate from Linden, Alabama, a Class B state, to Poplarville, Mississippi.

3. On or about October 3, 1984, the respondent moved five (5) cows interstate from Frisco City, Alabama, a Class B state, to Lucedale, Mississippi.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of one thousand dollars (\$1,000.00) which shall be payable to the "Treasurer of the United States", by certified check or money order and which shall be sent to "USDA, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403" within thirty (30) days from the effective date of this Order. Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 273.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: BERT SMITH, A.Q. Docket No. 270. Decided October 31, 1986.

Dorothea A. Baker, Administrative Law Judge.

Kevin Thiemann, for complainant.

Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regu-

lations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Bert Smith, respondent, is an individual whose address is Box 725, Church Hill, Tennessee 37642.

2. On or about May 24, 1984, the respondent moved approximately fifty-eight (58) cows interstate from Abingdon, Virginia, a Class A state, to Church Hill, Tennessee.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of two hundred fifty dollars (\$250.00) which shall be payable to the "Treasurer of the United States" by certified check or money order and which shall be sent to "USDA, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403," within thirty (30) days from the effective date of this Order. Respondent shall indicate on the certified check

or money order that payment is in reference to A.Q. Docket No. 270.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

ANIMAL WELFARE ACT
Volume 45 Number 5

In re: DONALD D. FOSTER, d/b/a WHITE GATE KENNELS, AWA
Docket No. 375. Order issued September 5, 1986.

John A. Campbell, Administrative Law Judge.
Robert Frisby, for complainant.
Pro se, for respondent.

SUPPLEMENTAL ORDER

On June 18, 1986, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a dealer under the Act ". . . for thirty days and thereafter until he demonstrates to the Animal and Plant Health Inspection Service (APHIS) that he is in full compliance with the Act and the regulations and standards issued thereunder."

The respondent has demonstrated to APHIS that he is in full compliance with the Act and the regulations and standards issued thereunder. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued June 18, 1986, is terminated. The order shall remain in effect in all other respects.

In re: DEAN LEWIS, AWA Docket No. 390. Decided September 5, 1986.

Edward H. McGrail, Administrative Law Judge.
Howard Haas, for complainant.
Pro se, for respondent.

DECISION (CONSENT)

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint and order to show cause filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and order to show cause and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

The respondent Dean Lewis is an individual with address at 4063 71st Street, S.E., Salem, Oregon 97301. The respondent, at all times material herein, was a dealer within the meaning of the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

The respondent, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

(1) Operating in any capacity for which a license is required under the Animal Welfare Act and the regulations issued thereunder without having applied for and obtained a license in accordance with the Act and the regulations.

(2) Operating as a licensee under the Act without submitting an annual license fee in accordance with 9 CFR § 2.6.

(3) Operating as a licensee under the Act without submitting an annual report in accordance with 9 CFR § 2.7.

(4) Operating as a licensee under the Act without promptly notifying the Veterinarian in Charge of any change in the name, address, management or substantial control or ownership of his business or operation within ten days after making such change, in accordance with 9 CFR § 2.8.

(5) Operating as a licensee under the Act without allowing access to and inspection by Animal and Plant Health Inspection Service Officials of his animal holding containers, animal transport, animal facilities, and records as required under the Act and regulations section 2.126 of the regulations (9 CFR § 2.126).

The respondent agrees that if he is issued a license under the Act, then for the three (3) years from the date of the issuance of a license he will file a quarterly report (a report every three months) with the Veterinarian in Charge in addition to the annual filing required by 9 CFR § 2.7(a).

The respondent is assessed a civil penalty of \$5,000.00 of which \$2,000.00 shall be paid by a certified check or money order made payable to the Treasurer of the United States. The remaining \$3,000.00 is hereby suspended and shall be held in abeyance, provided the respondent does not violate any of the provisions of this

order within three (3) years from the date this order becomes effective.

The respondent's application for a license under the Animal and Welfare Act and the regulations issued thereunder is hereby denied until the respondent demonstrates to the Animal and Plant Health Inspection Service that he is in full compliance with the Act and the regulations issued thereunder. When the respondent demonstrates to the Animal and Welfare Inspection Service that the respondent is in strict compliance with the Act and the regulations issued thereunder, a license will be issued in accordance with the Act and the regulations issued thereunder.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: ERTON PENDERGRASS, AWA Docket No. 385. Order issued September 18, 1986.

John A. Campbell, Administrative Law Judge.

John Griffith, for complainant.

Joseph D. Woodcock, Auror, Missouri, for respondent.

SUPPLEMENTAL ORDER

On July 31, 1986, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent's license (43-A047) starting on August 1, 1986, for thirty days and thereafter until respondent complied with the Act and the regulations and standards issued thereunder.

The respondent has demonstrated to APHIS that he is in full compliance with the Act and the regulations and standards issued thereunder. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued July 31, 1986, is terminated. The order shall remain in effect in all other respects.

In re: MAIMONIDES MEDICAL CENTER, AWA Docket No. 403. Decided September 18, 1986.

John A. Campbell, Administrative Law Judge.

Robert Frisby, for complainant.

Pro se, for respondent.

DECISION (CONSENT)

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131-2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that respondent willfully violated the regulations and standards issued pursuant to the Act, 9 CFR §§ 1.1-3.142. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

A. Maimonides Medical Center, hereinafter referred to as the respondent, is a New York corporation and its mailing address is 4802 Tenth Avenue, Brooklyn, New York 11219.

B. The respondent, at all times material herein, operated as a research facility as defined in the Act and was registered as a research facility (Registration Number 21-76) under the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Maimonides Medical Center shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from any violation thereof. In particular, respondent, its agents and employees, shall ensure that:

1) The walls of its facility are in good repair as required by 9 CFR §§ 3.1(a) and 3.50(a);

2) Pests are controlled adequately as required by 9 CFR §§ 3.7(d) and 3.56(d);

3) Resting boards for dogs are substantially impervious to moisture as required by 9 CFR § 3.2(d);

4) Resting boards for dogs are sanitized properly as required by 9 CFR § 3.7(b);

5) Dog cage doors and dog runs are in good repair as required by 9 CFR § 3.4(a);

6) Cages for rabbits are rust-free as required by 9 CFR § 3.53(a);

7) Rabbit cages are properly sanitized as required by 9 CFR § 3.56(b);

8) Leaking battery acid is removed from the floor of its facility as required by 9 CFR §§ 3.7(c) and 3.56(c); and

9) Adequate post-operative veterinary care is provided for dogs as required by 9 CFR § 3.10.

Respondent is hereby assessed a civil penalty of \$500 to be paid by certified check or money order made payable to the Treasurer of the United States.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: HAROLD S. TAYLOR and ETHEL TAYLOR, AWA Docket No. 274.
Decided September 24, 1986.

Dorothea A. Baker, Administrative Law Judge.

Robert Frisby, for complainant.

Richard L. Hilton, Wichita, Kansas, for respondent.

DECISION (CONSENT)

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131-2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondents admit the jurisdictional allegations in the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree,

for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

A. Harold S. Taylor and Ethel Taylor are individuals and their mailing address is Box 248, Douglass, Kansas 67039.

B. The respondents, at all times material herein, operated as a dealer as defined by the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Harold S. Taylor and Ethel Taylor shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from any violation thereof. In particular, respondents shall cease and desist from engaging in any business for which a license is required under the Act without first obtaining a license as required by the Act and the regulations.

Respondents are hereby assessed a civil penalty of \$5,000, \$3,000 of which is suspended provided the respondents do not engage in any business for which a license is required under the Act for period of five (5) years. The respondents may apply for a license after this 5-year period has expired. The remaining \$2,000 of the civil penalty is payable by certified check or money order made to the order of the Treasurer of the United States.

The provisions of this order shall become effective on the first day after service of this decision on the respondents.

Copies of this decision shall be served upon the parties.

In re: MRS. F.W. BOEBEL, d/b/a BOEBEL VETERINARY RESEARCH CENTER & CLINIC and SLEEPY HOLLOW KENNEL & CATTERY.
AWA Docket No. 404. Decided September 30, 1986.

John A. Campbell, Administrative Law Judge.
Robert Frisby, for complainant.
Pro se, for respondent.

DECISION (CONSENT)

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131-2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act, 9 CFR §§ 1.1-3.142. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Mrs. F.W. Boebel, hereinafter referred to as the respondent, is an individual doing business as Boebel Veterinary Research Center & Clinic and Sleepy Hollow Kennel & Cattery. Her mailing address is 21797 W. Highway 176, Mundelein, Illinois 60060.

2. The respondent, at all times material herein, operated as a dealer as defined in the Act and held a Class B license (33-B-48) issued under the Act. The respondent is also registered as a research facility (Registration Number 33-75).

3. On July 9, 1986, the respondent demonstrated that her facility is in compliance with the Act and the regulations and standards issued thereunder.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Mrs. F.W. Boebel shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from any violation thereof. In particular, respondent, her agents, employees, directly or through any corporate device, shall ensure that:

- 1) Animal feed is stored properly as required by 9 CFR § 3.1(c);
- 2) Adequate heating is provided in her facility housing cats as required by 9 CFR § 3.2(a);
- 3) Adequate ventilation is provided in her facility housing cats as required by 9 CFR § 3.2(b);
- 4) Interior surfaces are substantially impervious to moisture as required by 9 CFR § 3.2(d).
- 5) Cat cages and dog runs are in good repair as required by 9 CFR § 3.4(a);
- 6) Sufficient space is provided for cats as required by 9 CFR § 3.4(b);
- 7) Adequate feed and clean feed receptacles are provided for dogs as required by 9 CFR § 3.5;
- 8) Clean, rust-free water receptacles are provided for dogs and cats as required by 9 CFR § 3.6;
- 9) Cat litter pans are cleaned sufficiently as required by 9 CFR § 3.7(a);
- 10) Her facility is free of accumulations of junk and debris as required by 9 CFR § 3.7(c);
- 11) Rodents are controlled as required by 9 CFR § 3.7(d); and
- 12) Adequate veterinary care is provided for cats as required by 9 CFR § 3.10(b).

Respondent is hereby assessed a civil penalty of \$500 to be paid by certified check or money order made payable to the Treasurer of the United States.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: ROY J. MORDAUNT and BIO-LAB CORPORATION. AWA Docket No. 392. Decided October 10, 1986.

Edward H. McGrail, Administrative Law Judge.

John D. Griffith, for complainant.

James Hamilton, Minneapolis, Minn., for respondent.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131-2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the regulations and standards issued pursuant to the Act, 9 CFR §§ 1.1-3.142. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Roy J. Mordaunt is an individual whose mailing address is Post Office Box 10589, 5228 Centerville Road, St. Paul, Minnesota 55110.

2. Bio-Lab is a corporation whose mailing address is Post Office Box 10589, 5228 Centerville Road, St. Paul, Minnesota 55110.

3. Respondent Bio-Lab Corporation, is, and all times material herein was owned, managed, and controlled by respondent Mordaunt. Respondent Mordaunt established its policies and directed its activities, including those which constitute the violations of the regulations and standards alleged herein.

4. Respondents at all times material herein were dealers within the meaning of that term as defined in the Act and subject to the provisions of the Act and the regulations and standards issued thereunder.

5. Respondent Bio-Lab Corporation at all times material herein was licensed as a Class A dealer under the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from any violation thereof. Specifically, the respondents shall cease and desist from failing to:

(a) Meet the necessary space requirements for primary enclosures as required by 9 CFR § 3.28;

(b) construct and maintain interior building surfaces in the wash room as required by 9 CFR §§ 3.26 and 3.31;

(c) Clean and sanitize cage holding racks as required by 9 CFR §§ 3.26 and 3.31;

(d) Clean and sanitize primary enclosures as required by 9 CFR § 3.31.

Respondents agree to make certain improvements to the facility. Said improvements shall be completed within a specified period of time as agreed to between the parties.

Respondents are hereby assessed a civil penalty of \$3,000 to be paid by certified check or money order payable to the Treasurer of the United States.

Respondents' license is suspended for fourteen (14) days and thereafter until respondents demonstrate to the Animal and Plant Health Inspection Service (APHIS) that their facility complies with the Act and the regulations and standards issued thereunder. When respondents demonstrate to APHIS that they are in compliance with the Act and the regulations and standards issued thereunder, a supplemental order will be issued upon the motion of APHIS in this proceeding terminating this suspension.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: ELSIE MOUTRAY. AWA Docket No. 388. Decided October 14, 1986.

Edward H. McGrail, Administrative Law Judge.

Mary Hobbie, for complainant.

Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2731 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint, and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

(a) Respondent Elsie Moutray is an individual doing business at 3740 Pettis Road, St. Joseph, Missouri 04503.

(b) Respondent, at all times material herein, was engaged in business as a dealer within the meaning of the Act and was licensed under the Act with a Class B license No. 435x.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, her agents and employees, acting directly or indirectly, or through any corporation, trust, or other device, shall cease and desist from violating any and all provisions of the Animal Welfare Act, and the regulations and standards issued thereunder.

Respondent is assessed a civil penalty of \$750.00, which shall be paid by certified check or money order made payable to the Treasurer of the United States.

Respondent's license as a dealer under the Animal Welfare Act is suspended for sixty (60) days and thereafter until she demonstrates to the Animal and Plant Health Inspection Service that she is in full compliance with the Act and the regulations and standards issued thereunder.

At the end of said sixty (60) days, Respondent shall request that the Animal and Plant Health Inspection Service (APHIS) reinspect her facilities. When Respondent demonstrates to APHIS that she is in full compliance with the Act and the regulations and standards issued thereunder, the Animal and Plant Health Inspection Service shall request that a motion for supplemental order be entered in this proceeding that will terminate the suspension.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: FRONTIER AIRLINES, INC. AWA Docket No. 418. Order issued October 20, 1986.

John A. Campbell, Administrative Law Judge

M. Bradley Flynn, for complainant.

Charles Hobbs, Denver, Colorado, for respondent.

ORDER DISMISSING COMPLAINT

The Complainant has moved to dismiss its complaint. For good cause shown, it is hereby ORDERED, that the Complaint in this proceeding be, and hereby is, dismissed.

In re: ALMAN WISE, d/b/a TARHEEL CATTERY. AWA Docket No. 407. Decided October 28, 1986.

Victor W. Palmer, Administrative Law Judge.

Robert Frisby, for complainant.

Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131-2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent knowingly and willfully violated the Act and the regulations and standards issued thereunder 9 CFR §§ 1.1-3.142. This decision is en-

tered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

A. Alman Wise, hereinafter referred to as the respondent, is an individual doing business as Tarheel Cattery and his mailing address is Rt. 1, Post Office Box 60-E, Benson, North Carolina 27504.

B. The respondent, at all times material herein, operated as a dealer as defined in the Act and held a Class B license (No. 55-B-37) issued pursuant to the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Alman Wise, his agents and employees, shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from any violation thereof. In particular, respondent, his agents and employees, directly or through any corporate device, shall cease and desist from failing to:

- 1) Identify all cats immediately upon acquisition in strict conformity with the requirements in 7 U.S.C. § 2141 and 9 CFR § 2.50;
- 2) Maintain complete records on all cats acquired in accordance with the requirements in 7 U.S.C. § 2140 and 9 CFR § 2.75(a);
- 3) Retain all cats acquired for at least the minimum five (5) day holding period in accordance with 7 U.S.C. § 2135 and 9 CFR § 2.101;
- 4) Transport cats in cages with sufficient litter to absorb and cover excreta in accordance with 9 CFR § 3.12(e);
- 5) Transport cats in cages with sufficient space for the cats to turn about freely in a standing position using normal body movements, to stand and sit erect, and to lie in a natural position in accordance with 9 CFR § 3.12(c); and

6) Provide receptacles containing litter for cats in enclosures with solid floors in accordance with 9 CFR § 3.4(a)(2)(i).

The respondent is hereby assessed a civil penalty of \$6,000 to be paid by certified check or money order made payable to the Treasurer of the United States.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: GREAT AMERICAN VEAL COMPANY, INC. FMIA Docket No. 71.
Decided September 9, 1986.

Bribery of certified meat inspectors—Fraud in food transactions

The Judicial Officer reversed Judge Baker's order withdrawing meat inspection service from respondent under the Federal Meat Inspection Act for 36 months, but suspending such withdrawal, except for 30 days, under certain conditions of compliance for 3 years. The Judicial Officer withdrew inspection indefinitely from respondent, but suspended the withdrawal if Mr. Burke, respondent's president and chief operating officer, becomes disassociated from respondent within 90 days and sells his stock within 1 year, and respondent is in compliance for 5 years. The order was issued under 21 U.S.C. § 671 as a result of Mr. Burke's conviction of 23 counts of contributing and supplementing the salary of the veterinarian medical officer of USDA assigned to respondent's plant, in connection with his official duties as the certified inspector. Convictions under 18 U.S.C. § 209(a) of supplementing the salary of the meat inspector assigned to a packing plant are necessarily based upon "fraud in connection with transactions in food," thereby affording a jurisdictional basis under 21 U.S.C. § 671 for a finding that the plant is "unfit" to receive meat inspection. Such convictions strike at the heart of the meat inspection program and *per se* render the plant "unfit" to receive meat inspection, regardless of any mitigating circumstances, unless the convicted individual is disassociated from the plant. USDA's *per se* approach is similar to the *per se* approach followed by the courts under the Sherman Act, under which price fixing and other antitrust violations are illegal *per se*. Prior cases involving the withdrawal of inspection or grading services summarized. Although the Judicial Officer believes that he correctly decided *In re Utica Packing Co.*, 43 Agric. Dec. ____ (Nov. 18, 1982) (decision on remand), in view of the subsequent *Utica* court decisions, he will construe the court of appeals' first *Utica* decision as requiring a consideration of the mitigating circumstances merely because the court was not sure whether the USDA proposition underlying its *per se* approach is correct or not. Assuming that the facts must be considered, the facts here show "fraud in connection with transactions in food" which render the plant "unfit" to receive meat inspection. Even if an inspector or grader used language that led the convicted individual to believe that a bribe was being solicited, that would not be significant in determining whether the packing plant is unfit to receive inspection.

Decision by Donald A. Campbell, Judicial Officer.

Harold Reuben, for complainant.

Harriet B. Rosen, Segal & Hundley, New York, N.Y., for respondent.

DECISION AND ORDER

This is an administrative action under the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq.*), in which an initial Decision and Order was filed on December 19, 1985, by Administrative Law Judge Dorothea A. Baker (ALJ) withdrawing inspection service from respondent for 36 months, but suspending such withdrawal, except for a period of 30 days, under certain conditions of compliance for 3 years.

On February 28, 1986, complainant appealed to the Judicial Officer, to whom final administrative authority to decide the Depart-

ment's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).¹ Complainant seeks the indefinite withdrawal of inspection service from respondent, with the withdrawal suspended if Thomas J. Burke, respondent's president and chief operating officer, is disassociated from respondent, and respondent is in compliance for 5 years.

On March 3, 1986, respondent appealed to the Judicial Officer, seeking the dismissal of the complaint.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not complex, prior cases (while not directly in point) are persuasive as to the result here, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the entire record, I am issuing the order proposed by complainant, except that Mr. Burke is given 90 days within which to become disassociated from respondent and one year within which to sell his stock, and the provision activating the withdrawal of inspection if any of respondent's personnel commit "any felony" within 5 years is deleted. The first three findings of fact set forth below are taken verbatim from complainant's proposed findings filed before the ALJ on October 9, 1984 (Complainant's Corrected Proposed Findings, etc., at 2-3). These were the only findings of fact proposed by complainant, and they were stipulated to in respondent's proposed findings filed before the ALJ on December 5, 1984 (Respondent's Proposed Findings, etc., at 4). The fourth finding is an ultimate finding derived from Findings 1, 2 and 3.

FINDINGS OF FACT

1. Respondent is now, and at all times material was, a corporation which operates a cattle slaughtering and meat processing establishment in Newark, New Jersey, and is a recipient of Federal inspection services under Title I of the Act. Respondent's mailing address is 50 Avenue L, Newark, New Jersey 07105.

¹ The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

2. Thomas J. Burke is now, and at all times material was, the president of, chief operating officer of, and responsibly connected with, the respondent.

3. On or about May 19, 1983, in the United States District Court for the District of New Jersey, Thomas J. Burke was convicted of twenty-three (23) counts of contributing and supplementing, in various sums, the salary of Dr. Michael Gabriel, a veterinary medical officer of the United States Department of Agriculture, in connection with his official duties as the certified inspector assigned to the respondent, in violation of Title 18, United States Code, sections 209(a) and 2.

4. By reason of the facts set forth in Findings 1 through 3, *supra*, respondent is unfit to engage in any business requiring inspection under subchapter I of the Federal Meat Inspection Act.

CONCLUSIONS

I. Mr. Burke's 23 Misdemeanor Convictions Under 18 U.S.C. § 209(a) Are Based on "Fraud in Connection with Transactions in Food," and Render Respondent "Unfit" to Receive Meat Inspection Unless Mr. Burke Is Disassociated from the Plant.

The statutory provisions now designated as the Federal Meat Inspection Act were originally enacted in 1907 as part of the Department's Appropriation Act. The 1907 Act made it a felony for any person to give money or other thing of value to a meat inspector with intent to influence the inspector in the discharge of his duties. 21 U.S.C. § 622. The 1907 Act also authorized the Secretary to withdraw meat inspection services from establishments failing to maintain sanitary conditions or to destroy condemned carcasses, parts, meat or meat food products. 7 U.S.C. §§ 604, 606, 608.

The provisions of the Federal Meat Inspection Act were substantially strengthened in 1967 by the inclusion of the provisions under which the present proceeding was brought. In the 1967 amendatory legislation, the Congress set forth the following Congressional statement of findings (21 U.S.C. § 602; emphasis added):

§ 602. *Congressional statement of findings*

Meat and meat food products are an important source of the Nation's total supply of food. They are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce. It is *essential* in the public interest that the health and welfare of consumers be protected by *assuring* that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. Unwhole-

some, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers. The unwholesome, adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally. It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce, and that regulation by the Secretary and cooperation by the States and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers.

In order to further protect the "health and welfare of consumers" (7 U.S.C. § 602), Congress added the provisions under which this proceeding was brought, which state (21 U.S.C. § 671; emphasis added):

The Secretary may (for such period, or indefinitely, as he deems necessary to effectuate the purposes of this chapter) refuse to provide, or withdraw, inspection service under subchapter I of this chapter with respect to any establishment if he determines, after opportunity for a hearing is accorded to the applicant for, or recipient of, such service, that such applicant or recipient is unfit to engage in any business requiring inspection under subchapter I of this chapter because the applicant or recipient, or anyone responsibly connected with the applicant or recipient, has been convicted, in any Federal or State court, of (1) any felony, or (2) more than one violation of any law, other than a felony, based upon the acquiring, handling, or distributing of unwholesome, mislabeled, or deceptively packaged food or upon fraud in connection with transactions in food. This section shall not affect in any way other provisions of this chapter for withdrawal of inspection services under subchapter I of this chapter from establishments

failing to maintain sanitary conditions or to destroy condemned carcasses, parts, meat or meat food products.

The conviction of Thomas J. Burke, respondent's president and chief operating officer, of 23 misdemeanors involving contributing to and supplementing the salary of Dr. Gabriel, the Department's veterinary medical officer assigned to perform the Department's inspection service at respondent's plant, in connection with his official duties as the certified inspector assigned to respondent, inherently and necessarily (i) involves "fraud in connection with transactions in food," and (ii) renders respondent "unfit" to engage in business requiring the Department's meat inspection services (21 U.S.C. § 671).

The criminal statute under which respondent was convicted provides (18 U.S.C. § 209(a)):

§ 209. Salary of Government officials and employees payable only by United States

(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—

Shall be fined not more than \$5,000 or imprisoned not more than one year, or both.

The provisions of 18 U.S.C. § 2, also involved in Mr. Burke's criminal convictions, merely make it clear that he was punishable as a principal.²

² § 2. *Principals*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

A. Convictions of Supplementing the Salary of the Meat Inspector Assigned to a Packing Plant in Connection with His Official Meat Inspection Duties Are Necessarily Based Upon "Fraud in Connection with Transactions in Food."

All of the work of a meat inspector at a packing plant relates to "transactions in food," and, therefore, when Mr. Burke, the president and chief operating officer of respondent's packing plant, was convicted of 23 counts of supplementing the salary of the Federal inspector assigned to inspect at the plant, in connection with his official duties as the certified inspector at the plant, the convictions are necessarily based upon "transactions in food." In addition, since Mr. Burke was convicted of violating a Federal conflict-of-interest statute, his convictions are necessarily based upon "fraud."

The provisions in 18 U.S.C. § 209(a) were added in 1962 to replace similar conflict-of-interest provisions previously in 18 U.S.C. § 1914 (62 Stat. 683, 793 (1948)), which, in turn, were derived from the Act of March 3, 1917 (39 Stat. 1070, 1106 (1917)). The Senate Report relating to the 1962 amendatory legislation expressly refers to the replaced provisions of 18 U.S.C. § 1914 as "relating to conflicts of interest" (S. Rep. No. 2213, 87th Cong., 2d Sess., *reprinted in* 1962 U.S. Code Cong. & Ad. News 3852, 3856). The Senate Report explains the provisions of 18 U.S.C. § 209(a) as follows (*id.* at 3863):

Section 209. Salary of Government officials and employees payable only by United States

Section 209 is similar to title 18, United States Code, section 1914. The latter prohibits a Government employee from receiving any salary in connection with his Government services from a private source. Subsection (a) of section 209 would reenact this prohibition in substance and, in addition, would make it an offense for anyone to make a payment to a Government employee the receipt of which would violate the section.

The present statute's ban on the receipt of private payments "in connection with" an employee's Government services is replaced in section 209(a) with a ban on the receipt of such payments "as compensation for" such services. The new language is more precise in expressing what is clearly intended by the present broad phrase.

* * * * *

The maximum penalties authorized by section 209 are a fine of \$5,000 or imprisonment for 1 year, or both.

The Senate Report as to the amendatory legislation concludes with the following language (*id.* at 3864):

The committee is of the opinion that this legislation, as amended by the committee, is a long step forward in strengthening and revising the existing conflict-of-interest laws.

The House Report with respect to the 1962 amendatory legislation emphasizes that the criminal prohibition in 18 U.S.C. § 209(a) is against private payment made to a government employee expressly for services rendered to the Government. The report states (H.R. Rep. No. 748, 87th Cong., 1st Sess. 24-25 (1961)):

Salary of Government officials and employees payable only by United States (sec. 209)

Section 209 varies only to a minor extent in its substantive prohibitions from the section which it would replace, 18 U.S.C. 1914, which prohibits a Government employee from receiving compensation for his Government service from private sources and also prohibits any nongovernmental person or organization from paying or supplementing the employee's Government salary for such service.

Section 1914 prohibits the receipt of private "salary" in connection with an employee's Government services. Section 209 prohibits the receipt of salary, "or any contribution to or supplementation of salary," to conform with the equivalent prohibition imposed upon the payor by section 209.

Whereas the prohibition of section 1914 applies to private salary paid "in connection with" the Government services of the employee, section 209 substitutes the phrase "as compensation for" his services as an officer or employee in order to emphasize the intent that the prohibition is against private payment made expressly for services rendered to the Government. The phrase "in connection with" is vague and capable of an indefinitely broad interpretation.

The enumeration of persons forbidden to pay a Government employee for his Government services is extended by section 209 to include a "partnership" and "other organization," and "an individual" is substituted for "a person." The modified enumeration is more comprehensive than in section 1914 and makes clear the intent that any kind of

organization, whether profit or nonprofit, should be subject to the prohibition of the section.

* * * * *

The inclusion of the specified exceptions is not to be construed as limiting the right of an employee to receive compensation from private sources except as payment for his services as a Government official. The section does not bar private employment or other activities not connected with the Government position of the official and not proscribed by other statutory prohibitions.

The penalty provision of section 1914 is increased in section 209 from a fine of not more than \$1,000 or imprisonment for not more than 6 months, or both, to a maximum fine of \$5,000 or maximum imprisonment of 1 year or both.

In *United States v. Pezzello*, 474 F. Supp. 462, 463 (N.D. Tex. 1979), the court concluded that where an employee of the Army and Air Force Exchange Service (AAFES), an instrumentality of the United States, received \$13,000 as an illegal supplement to his Federal salary from individuals and corporations contracting with AAFES, the receipt of the payments constituted a breach of the employee's fiduciary duties and agency relationship. The court held (474 F. Supp. at 463):

2. The receipt of \$13,000 by AAFES employee Anthony Pezzello from individuals and corporations doing business with AAFES constituted a breach of Pezzello's fiduciary duties and agency relationship with his employer, AAFES, and Defendant Pezzello is liable in this amount to AAFES.

3. Defendant Pezzello would be equally liable to return the sum of \$13,000 he improperly received while in the employ of AAFES under the theory of unjust enrichment since he has received something of value at the expense of AAFES under circumstances which impose a legal duty of restitution.

In *Exchange National Bank of Chicago v. Abramson*, 295 F Supp. 87, 89-90 (D. Minn. 1969), the court explained that 18 U.S.C § 209(a) "is designed to prohibit outsiders from supplementing a government employee's salary," and that "[t]he evils of such, were it permitted, are obvious."

In *United States v. Raborn*, 575 F.2d 688, 691-92 (9th Cir. 1978), the court held that both 18 U.S.C. § 209 and 18 U.S.C. § 201(c) ³ seek to prevent the divided loyalty of public employees, but that the section 209 offense is not a lesser included offense because the section 201(c) offense could be committed without committing the section 209 offense. The court held (*ibid.*):

Appellant also claims that the misdemeanor offense defined under 18 U.S.C. § 209 is a lesser included offense of § 201(c) and that the court erred in refusing to give an instruction to this effect. A crime is a lesser included offense of another crime if the lesser offense is necessarily presented as part of the showing of the greater offense, and both crimes relate to the protection of the same interests. *United States v. Stolarz*, *supra*, 550 F.2d at 491. "Stated differently, the [lesser] offense must not require some additional element not needed to constitute the greater offense." *Olais-Castro v. United States*, 416 F.2d 1155, 1157 (9th Cir. 1969). Under Fed.R.Crime.P. 31(c), when some of the elements of the crime charged constitute a lesser crime, the defendant is entitled to an instruction on the lesser included offense if the evidence will support such a charge. *Sansone v. United States*, 380 U.S. 343, 349, 85 S.Ct. 1004, 13 L.Ed.2d 882 (1965); *Olais-Castro v. United States*, *supra*.

Comparing the essential elements of section 201(c) and section 209, we find that the latter is not a lesser included offense of the former. Section 209 prohibits (1) an officer or employee of the executive branch or an independent

³ (c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

- (1) being influenced in his performance of any official act; or
- (2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; or
- (3) being induced to do or omit to do any act in violation of his official duty . . .

Shall be fined not more than \$20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

agency of the United States government from (2) receiving salary or any contribution to or supplementation of salary from (3) any source other than the United States (4) as compensation for services as an employee of the United States. 18 U.S.C. § 209. Section 201(c) requires proof that a (1) public official¹ (2) corruptly (3) asked, demanded, received, or agreed to receive an item of value (4) in return for being influenced in the performance of any official act or being influenced to commit or aid in committing a fraud on the United States, or being induced to act in violation of an official duty. 18 U.S.C. § 201(c). While both sections seek to prevent the divided loyalty of public employees, the section 201(c) offense could be committed without committing the section 209 offense. Both crimes require proof that a public employee received something of value from an outside source, but section 209 requires proof of an additional element that section 201(c) does not, namely that the public employee received salary or a supplement to salary "as compensation for services as an employee of the United States." Under section 201(c), the public official need not receive the item of value as compensation for services as a government employee, but only as a *quid pro quo* in return for influence or the commission of a wrongful act. We conclude that the court properly denied appellant's request for a lesser included offense instruction.

¹ Public official is defined in relevant part as "an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof . . . in any official function, under or by authority of any such department, agency, or branch of Government. . . ." 18 U.S.C. § 201(a).

The conviction of Mr. Burke of 23 misdemeanor counts of supplementing the salary of the Department's veterinary medical officer in connection with the veterinarian's official duties as the certified inspector assigned to respondent's plant necessarily and inherently involves fraud.

In the world of Alice in Wonderland, it might be inferred that Mr. Burke supplemented the salary of the government veterinarian assigned to his plant in connection with the veterinarian's official duties as the inspector assigned to respondent's plant merely because Mr. Burke felt that all government employees are underpaid, and he wanted to do his part to correct that injustice. But in the real world in which we operate, I infer that Mr. Burke supplemented the inspector's salary in connection with his official duties as the certified inspector assigned to respondent's plant (at least) in

order to gain favor with the inspector, thereby obstructing or subverting (at least to some degree) the relationship between the inspector and the Government. Any such interference with the employment status of the Federal inspector vis-a-vis the Government is fraudulent.

The term "fraud" is not defined in the Federal Meat Inspection Act (21 U.S.C. 671). It is defined in Webster's Third New International Dictionary, Unabridged 904 (1981), as follows:

fraud . . . 1a: an instance or an act of trickery or deceit esp. when involving misrepresentation: an act of deluding: . . . (2) *or* fraud in equity: an act, omission to act, or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another (as an act in violation of a relationship of trust and confidence)—called also *equitable fraud*, *legal fraud*; . . . b: a means used in trickery: a dishonest stratagem or a spurious thing passed off as genuine: . . . 2: the quality of being deceitful: the disposition to deceive. . . .

By way of analogy, the phrase "to defraud the United States" in a criminal conspiracy statute (now 18 U.S.C. § 371) was defined by the Court as follows:

To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest.

Hammerschmidt v. United States, 265 U.S. 182, 188 (1924); *accord United States v. Richter*, 610 F. Supp. 480, 485-86 (N.D. Ill. 1985).

Mr. Burke's criminal convictions clearly involve fraud, as that term is ordinarily understood.

Respondent contends that there was no fraud because the loyalty of the government inspector was not subverted but, rather, he went to the Department's Inspector General, and with the concurrence of the Department of Justice, he was wired with a tape recorder, resulting in respondent's convictions. Although in a civil action under common law based upon fraud it might be necessary to prove that the plaintiff relied upon the fraud to his detriment, the term fraud in its ordinary usage is not restricted in that manner. It would be absurd to construe the word "fraud" in 21 U.S.C. § 671 to apply only to misdemeanor convictions where the inspector was

dishonest and accepted the supplement to his income without advising the Department of the criminal activity.

Under respondent's argument, the presidents of two meat packing plants could engage in the exact same conduct, and be convicted under 18 U.S.C. § 209(a) of the exact number of misdemeanors, but the misdemeanors in one case would be regarded as involving "fraud," so that the plant could be found "unfit" to receive inspection, whereas the misdemeanors in the other case would *not* be regarded as involving "fraud," so that the plant could *not* be found "unfit" to receive inspection, depending on whether the inspector at the plant happened to be honest or dishonest with respect to the income supplementation. Such a narrow and debilitating construction would completely thwart the congressional purpose of this remedial legislation.

For the foregoing reasons, I conclude that Mr. Burke's convictions involve "fraud in connection with transactions in food," which affords a statutory basis for a finding that respondent is "unfit" to continue to receive inspection service under the Federal Meat Inspection Act.

To summarize, the Department is following a *per se* approach in this case, which will be followed in all future cases involving convictions under 18 U.S.C. § 209(a). That is, since convictions of a packing plant official under 18 U.S.C. § 209(a) involving payments to the Federal meat inspector assigned to his plant require proof that the payments were made "as compensation for his services as an officer or employee of the executive branch of the United States Government," it will be inferred in *every* case, irrespective of the particular facts revealed by the record of the criminal proceeding, that the convictions are based upon "fraud in connection with transactions in food," which affords a jurisdictional basis for finding that the packing plant is "unfit" to receive inspection service.⁴

⁴ This jurisdictional issue does not arise where there has been a felony conviction for corrupt bribery under 18 U.S.C. § 201(b) or for an unlawful gratuity "for or because of any official act performed or to be performed" by an inspector under 18 U.S.C. § 201(f) since the Federal Meat Inspection Act (21 U.S.C. § 671) does not require that a felony involve fraud or food. *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 398-94 (1979), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982).

B. Convictions of Supplementing the Salary of the Meat Inspector Assigned to a Packing Plant in Connection with His Official Meat Inspection Duties Strike at the Heart of the Meat Inspection Program and Per Se Render the Plant "Unfit" to Receive Meat Inspection, Regardless of any Mitigating Circumstances, Unless the Convicted Individual Is Disassociated from the Plant.

The authority given to the Secretary of Agriculture by Congress to withdraw inspection service from a plant if he determines that, because of certain criminal convictions, the plant is unfit to receive inspection is not to provide additional punishment for the offenses involved in the convictions. Congress was well aware of the fact that when a person is convicted of a criminal offense in a state or federal court, the criminal sentence provides the punishment for the offense. In determining the punishment for the offense, no matter how serious the offense, mitigating circumstances are, of course, highly relevant.

But the withdrawal of inspection service because of criminal convictions is not to punish, but, rather, to protect the health and welfare of consumers by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled and packaged (21 U.S.C. § 602). Accordingly, in determining whether a plant is "unfit" to receive inspection because of criminal convictions, since punishment is not involved, we should not look to criminal standards.

The *only* reason why *any* type of criminal conviction might make a plant "unfit" to receive inspection is that, because of the conviction, the inspection service could no longer depend on the reliability and integrity of the plant's management. As stated in many previous cases discussed below in this section, since meat inspectors cannot observe every activity at a plant by every employee which affects the wholesomeness of the product, the inspection service must be able to depend on the reliability and integrity of the plant's management to be assured that the health and welfare of consumers will be protected. See, e.g., *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 394-96 (1979), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982).

Specifically, the inspection service must be able to depend on the integrity of the plant's management not to attempt to subvert the loyalty of the inspector (through bribes or related offenses) or to thwart the inspection process, e.g., by sneaking prohibited chemicals or substances into meat or meat products behind the inspector's back, or surreptitiously using condemned products.

The official mark "U.S. INSP'D & P'S'D" is a symbol accepted throughout the United States as assurance that the meat is whole-

some and not adulterated or misbranded. Similarly, official Federal grade marks, such as "USDA Choice," are accepted throughout the United States as assurance that the meat is of a certain quality. Those marks will continue to be accepted as assurance of wholesomeness and quality only if government inspectors and graders continue to have competence and integrity, and packing plant operators continue to cooperate with, rather than attempt to subvert, the inspection and grading process.

The great majority of packing plant operators and inspectors and graders are competent and honest and, therefore, the public has good reason for accepting inspection and grading marks at face value. Unfortunately, however, there are a number of circumstances relating to the inspection and grading process that lend themselves to bribery and related offenses, and, therefore, the administrative officials charged with the responsibility for assuring the wholesomeness and proper quality designation of our Nation's meat supply maintain an ongoing program to prevent and eliminate such offenses. A number of the more obvious circumstances that lend themselves to bribery and related offenses are discussed immediately below.

First, the vast majority of government employees work in a government office surrounded by other government employees, with their supervisors nearby. However, meat inspectors and graders work in a meat plant, which is the property of the packing plant owners, surrounded by employees and officials of the packing plant. In many packing plants, such as respondent's plant, the inspector's supervisor is not located in the plant.

Second, meat inspectors, including some supervisors, are relatively low-paid employees, and packing plant officials have, at times, paid weekly (tax free) bribes to meat inspectors or graders equal to or more than their Federal take-home pay (see, *e.g.*, *In re National Meat Packers, Inc.*, 38 Agric. Dec. 169, 171-72 (1978)).

Third, inspectors and graders make decisions that have a large financial impact on the packing plant. Many decisions are borderline, involving close judgment calls. Some decisions affect far more than an individual animal or carcass. For example, the meat inspector has the power (which was exercised at respondent's plant) to stop the entire production line, which means that all, or many, of the packer's employees (respondent had about 25 employees (PX 9, p. 95))⁵ are standing around idly, drawing full pay until the in-

⁵ Numerous record references are included in this decision, but no attempt has been made to be exhaustive in the record citations. "Tr." references relate to the administrative proceeding and "PX" or "RX" references relate to the criminal record which was received in evidence (as exhibits) in the administrative proceeding.

spector permits the line to start again. Accordingly, "buying" the goodwill of the inspector or grader, or "buying" particular favors, is economically attractive, except for the penalties resulting from detection.

Bribery and related offenses are cancerous in nature which, unless stopped, can become the routine course of business among the inspectors and graders at a particular plant, or even in an entire area. See *In re National Meat Packers, Inc.*, 38 Agric. Dec. 169, 172-73 (1978), in which it is explained (footnote omitted):

In southern California between 1974 and 1976, 17 meat-packing houses and 35 employees of meatpackers were indicted and convicted of either bribery or illegally giving gratuity to meat graders. The involved plants constituted "a major part of the slaughtering companies or those using Federal grading service" in southern California (Tr. 19).

Sixteen Federal meat graders were indicted and convicted of receiving money.

All of these circumstances are relevant in judging the reasonableness of USDA's policy, which calls for the withdrawal or denial of Federal inspection or grading services where there have been convictions for bribery or related offenses involving meat inspectors or graders, regardless of mitigating circumstances, unless the convicted individual is disassociated from the plant.

Another relevant circumstance is reflected in the congressional statement of findings with respect to the Federal Meat Inspection Act, *viz.* (21 U.S.C. § 602; emphasis added):

It is *essential* in the public interest that the health and welfare of consumers be protected by *assuring* that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged.

In addition, it should be noted that the Department of Agriculture has no crystal ball to enable it to determine which persons convicted of bribery or related offenses involving the inspection or grading staff will repeat such offenses in the future. The record of judges and parole boards in determining which criminals can safely be placed on probation or released on parole is far from perfect. We could not expect to have a better record at USDA. Where the health of the public is at stake, the only responsible course of action is for USDA to pursue a hard-nosed, *per se* approach, under which any plant is determined to be unfit to receive inspection so long as a person who has been convicted of bribery or a related of-

fense involving the inspection or grading staff remains associated with the plant.

Adopting such a *per se* approach, or approving such a *per se* approach, involves making a choice between the economic interest of the criminal and the health and welfare of the United States public. I believe that the decision should be made in favor of fully protecting the public interest.

If the determination were to be made case by case as to whether convictions for bribery or related offenses involving the inspection or grading staff make a packing plant "unfit" to receive meat inspection (so long as the convicted individual remains associated with the plant), packing plant officials contemplating bribery or related offenses would know, first, that it is very difficult for the government to detect such offenses, and second, that even if detected, they might be able to continue to remain with the plant and receive inspection or grading services if they can make a showing that mitigating circumstances outweigh their convictions.

Such a case-by-case approach would encourage bribery and related offenses. In addition, as stated above, no one has the ability to predict, with the assurance required to protect the Nation's health, which persons convicted of bribery or a related offense involving the inspection or grading staff are going to repeat the offense. Where the Nation's health is at stake, I believe that it would be irresponsible to follow a case-by-case approach in determining unfitness in cases where the criminal convictions strike at the heart of the meat inspection program. In all cases where the criminal convictions strike at the heart of the meat inspection program, it is impossible to protect the national health unless all the plants involved (regardless of the mitigating circumstances) are determined to be "unfit" to receive inspection unless the convicted individual disassociates himself from the plant.

A reviewing court determining whether this *per se* approach is arbitrary or capricious should recognize that, in addition to the distinction between the purpose of criminal proceedings (to punish) and the purpose of this proceeding (to protect the national health), discussed above, there is another important distinction. An important goal of the criminal justice system is to rehabilitate offenders. It is not feasible or desirable to lock up all serious offenders forever. Hence the rehabilitation of offenders is an important consideration in criminal proceedings.

Here, however, the concept of rehabilitation has no applicability. Where, as here, the sole purpose of the proceeding is to protect the national health, we are not concerned with rehabilitating a criminal in the meat packing business. There is no shortage of meat

packers in this country! There is no shortage of persons willing to assume responsible roles in meat packing companies! (A particular packing plant may be dependent upon one individual, but if that individual is no longer available, and there is an economic need for the packing plant in the area, which is not always the case, someone can be found to take over the interest and duties of that individual, if necessary.) Accordingly, there is no need in this proceeding to be concerned with rehabilitating in the meat industry a criminal who has been convicted of crimes that strike at the heart of the meat inspection system.

The only proper concern here is whether the inspection service can be assured of the reliability and integrity of the plant's management if the convicted individual remains associated with the plant. Where an individual responsibly connected with a meat plant is convicted of a felony, or more than one misdemeanor, that strikes at the heart of the meat inspection program, it is irresponsible to take any approach other than to withdraw inspection service from the plant indefinitely unless the criminal becomes disassociated from the plant. (For a vivid account of how deplorable meat-packing conditions can be in the absence of an effective inspection system, see Upton Sinclair's *The Jungle* (1906)).

The Department's *per se* approach in the case of bribery and related offenses is just as reasonable as the *per se* approach followed by the courts under the Sherman Act (15 U.S.C. § 1).⁶ As stated in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4-5 (1958):

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were

⁶ See *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 308-16 (1956); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386 (1951); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951); *United States v. Paramount Pictures*, 334 U.S. 131, 143 (1948); *United States v. United States Gypsum Co.*, 333 U.S. 364, 400 (1948); *United States v. Line Material Co.*, 333 U.S. 287, 305-15 (1948); *United States v. Monsanto Corp.*, 316 U.S. 265, 274-82 (1942); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 212-28 (1940); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 458 (1940); *United States v. Trenton Pottery Co.*, 273 U.S. 392, 395-401 (1927).

that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which "unreasonably" restrain competition. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1; *Chicago Board of Trade v. United States*, 246 U.S. 231.

However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210; division of markets, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, *aff'd*, 175 U.S. 211; group boycotts, *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457; and tying arrangements, *International Salt Co. v. United States*, 332 U.S. 392.

The industry was advised of USDA's *per se* approach involving convictions for bribery and related offenses on June 26, 1979 (see subsection 1 immediately following). The *per se* approach is followed *only* where the convictions strike at the heart of the meat inspection or grading programs (see subsections 2-10, *infra*). The *per se* approach involving convictions that strike at the heart of the meat inspection program has been approved by two district judges, but rejected by another district judge and a court of appeals.

1. USDA's Per Se Policy Statement Involving Convictions for Bribery and Related Offenses.

On June 26, 1979, Donald L. Houston, Acting Administrator (now Administrator), Food Safety and Quality Service, USDA, published the following Policy Statement effective on publication (44 Fed. Reg. 37,322, 37, 322-24 (1979); emphasis added), which received widespread publicity in the meat packing industry:

Policy on Withdrawal or Denial of Federal Inspection or Grading and Acceptance Services Based Upon Convictions for Bribery and Related Offenses.

Agency: Food Safety and Quality Service, USDA.

Action: Notice.

Summary: This notice informs the public of the policy of the Food Safety and Quality Service relating to withdrawal or denial of Federal inspection or grading and acceptance service based upon convictions for bribery and related offenses.

Effective Date: June 26, 1979.

* * * * *

SUPPLEMENTARY INFORMATION: In recent years, the Department has instituted a number of administrative actions seeking the withdrawal or denial of Federal Meat Inspection Services pursuant to section 401 of the Federal Meat Inspection Act (FMIA) (21 U.S.C. 671), withdrawal or denial of Poultry Products Inspection Services pursuant to section 18(a) of the Poultry Products Inspection Act (PPIA) (21 U.S.C. 467(a)), withdrawal or denial of Egg Products Inspection Services pursuant to section 18 of the Egg Products Inspection Act (EPIA) (21 U.S.C. 1047), and withdrawal or denial of Federal Meat, Poultry, Egg, Dairy, Fruit, or Vegetable Grading and Acceptance Services pursuant to regulations promulgated in order to effectuate the purposes of the Agricultural Marketing Act of 1946 (AMA) (7 U.S.C. 1621 *et seq.*; 7 CFR 2853.11; 7 CFR 2870.44; 7 CFR 2855.200; 7 CFR 2856.31; 7 CFR 2858.58; 7 CFR 2851.46; 7 CFR 2852.54). Such proceedings have been instituted in order to determine whether certain persons and establishments are unfit to engage in a business requiring egg, meat, or poultry products inspection services or have violated the law or regulations regarding the various grading and acceptance services of the Department.

These administrative proceedings have been instituted in order to effectuate the purposes of these statutes, the protection of the health and welfare of consumers, and the preservation of a sound and efficient system for distributing and marketing agricultural products. The Department's efforts in proceeding against such persons or establishments are based upon a recognition of the importance of maintaining public confidence in the integrity of the inspection and grading systems, and a recognition of the fact that the public interest in the safety of its food supply warrants the imposition of the strictest standard of care.

Recently, many of the Department's actions in this regard have been based upon criminal convictions obtained against federally inspected establishments and/or against individuals responsibly connected with such establishments for bribery and related offenses such as the giving of unlawful gratuities to public officials. In addition to evidencing a lack of basic integrity, such convictions must be considered especially serious in the specific context of the meat and poultry industries. While the FMIA, PPIA, and EPIA require the mandatory inspection of the slaughtering of certain livestock and poultry and processing of products thereof, and of the processing of egg products, *it is physically impossible for Federal inspection personnel to oversee all actions taken by operators and employees of federally inspected establishments. Great reliance must, therefore, be placed upon the integrity of these individuals.* Similar reliance must be placed upon the integrity of those involved in the grading process operated under the AMA in order to insure that grading decisions are as accurate as possible and that consumers are accurately informed of the proper grades of products. *When such criminal convictions are based upon the giving or offering of bribes or gratuities to Federal inspection or grading personnel, such actions also pose a direct and tangible threat to the integrity of the inspection and grading systems. The Department has recognized the seriousness of such offenses in dealing with its own personnel, who have been subjected to immediate suspension without pay upon being charged with such offenses, and have been dismissed based upon the conviction for such offenses.*

After considering these issues in a number of administrative proceedings, the Food Safety and Quality Service

(FSQS) now considers it appropriate and in the public interest to publish a statement of general policy with regard to administrative actions for the withdrawal or denial of Federal inspection and/or grading and acceptance services, based upon convictions for bribery and related offenses. *For the purposes of this statement, convictions for bribery and related offenses shall include, but not be limited to, convictions for violations of 18 U.S.C. 201, 18 U.S.C. 209, 7 U.S.C. 1622(h), 21 U.S.C. 622, and Federal, State, and municipal statutes of a similar nature.*

The policy of FSQS in administrative actions brought for the withdrawal or denial of Federal inspection and/or grading and acceptance services, based upon convictions for bribery and related offenses, shall be as follows: *FSQS shall institute an administrative proceeding seeking the indefinite withdrawal or denial of Federal inspection and/or grading and acceptance services from any recipient of or applicant for such services when the Department's action is based upon a criminal conviction or convictions for bribery or related offenses.* FSQS will also exercise its authority, whenever it is deemed appropriate, to institute action to withdraw the benefits of such grading and acceptance services from individuals, as well as business entities, convicted of such crimes. Such proceedings shall be conducted in conformity with the applicable Rules of Practice, which afford the respondent the opportunity for a hearing before an Administrative Law Judge. Decisions rendered in such proceedings may then be appealed to the Judicial Officer of the Department, whose decisions may, in turn, be appealed to the Federal courts.

In the past, the Department has reached settlements in some proceedings of this nature which have included a provision for either the divestiture, by the convicted individual, of all interest in the respondent establishment, or the isolation by the convicted individual from all contact and communication with Federal grading and inspection personnel. *Isolation provisions will not be included in future settlements of such cases, but the Department may, under appropriate circumstances, reach settlements which include a provision which assures a complete divestiture, by all convicted individuals, of their entire ownership interest in and operational control or direction of the establishment in question, and the termination of all associations between*

the convicted individual or individuals and the establishment in question. FSQS will not enter into any specific settlements which does not have this effect. These settlements may also include a provision for actual withdrawal of services for a specified period of time. In addition, such settlement may contain such other terms and conditions as are determined to be appropriate on a case-by-case basis. For example, inspection or grading and acceptance services may be withdrawn immediately if the establishment in question or any of its officers, employees, or agents subsequently violates section 22 of the FMIA, or section 201 or 209 of Title 18 of the United States Code, or commits certain specified violations involving the preparation, sale, or transportation of adulterated or misbranded products. Such subsequent violations may be established either through conviction or final decision as to the facts in a formal adjudicatory proceeding before the Secretary. Further, nothing in this policy is intended to imply that a compromise settlement will be considered in all cases. Accordingly, the determination to consider such settlements will be made on a case-by-case basis.

Proceedings of this nature will be instituted by FSQS whenever the Secretary has jurisdiction to determine whether inspection or grading and acceptance services shall be withdrawn or denied based upon convictions for bribery and related offenses. FSQS will also continue to exercise its authority to institute proceedings for the withdrawal or denial of inspection or grading and acceptance services based upon other acts or offenses.

In instituting this policy, FSQS is aware that its application may have substantial impact upon affected individuals and establishments. However, after a full consideration of this issue, it has been determined that the institution of such a policy on a uniform basis is essential in order to protect the integrity of Federal Meat Inspection, Poultry Products Inspection, and Egg Products Inspection Programs, and the Federal Meat, Poultry, Egg, Dairy, Fruit, and Vegetable Grading and Acceptance Services. The Agency is, therefore, publishing this statement in order to notify all interested members of the public of its intention of pursuing the strongest possible sanction policy in this area. The intended effect of the adoption of such a policy will be the enhancement of the integrity of the industry

and the Federal programs, and the deterrence of bribery and related offenses in the future.

It should be noted that this Policy Statement expresses the Administrator's viewpoint that criminal convictions for bribery and related offenses involving the inspection staff establish *per se* that a plant is unfit to receive inspection, unless the convicted person is disassociated from the plant, regardless of any mitigating circumstances.⁷

This Policy Statement was issued only after the administrative officials had 11½ years' experience under the particular statutory provision at issue here, and many more years' experience relating to the general subject matter of bribery and related offenses. The Department had previously followed a number of approaches, including isolation provisions, which were found to be unworkable.

The administrative officials recognized the "substantial impact" of this *per se* policy upon affected individuals and establishments, but, "after a full consideration of this issue," the administrative officials "determined that the institution of such a policy on a uniform basis is essential in order to protect the integrity of Federal Meat Inspection" and other programs (44 Fed. Reg. at 37,324).

As I have indicated in prior decisions, I believe that the administrative, *per se* approach with respect to bribery and related offenses involving the meat inspection and grading staff is reasonable. In fact, I believe that it is the *only* policy that will achieve the congressional purpose of assuring the wholesomeness of the Nation's meat supply.

The packing industry has been on notice since June 26, 1979, that the administrative officials will seek the withdrawal of Federal inspection from any plant where there have been convictions for bribery or related offenses, including, specifically, convictions under 18 U.S.C. § 209(a), regardless of any mitigating circumstances, and the Department's Judicial Officer has consistently approved that policy. The relevant administrative and judicial cases as discussed below. (Since no case involves a conviction under 18

⁷ The Policy Statement does no more than set forth the Administrator's policy that will be followed in the case of convictions for bribery and related offenses under statutory provisions that were not, and could not be, altered by the Administrator. It is not a regulation and, therefore, it is not subject to the requirements relating to regulations. It is also not a "significant" regulation, action or decision since it does not alter any "enforcement or compliance requirements," and was not "likely to raise significant controversy due to conflict over questions of fact or impact." Accordingly, there is no basis for respondent's argument based on Executive Order 12044 (Mar. 23, 1978) or Secretary's Memorandum No. 1955 (Aug. 25, 1978).

U.S.C. § 209(a), no case is squarely in point, but most of the cases discussed below are closely analogous to the case at hand.)

2. *Norwich Beef Company.*

In *In re Norwich Beef Co.*, 38 Agric. Dec. 380 (1979), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982), *order modified*, 43 Agric. Dec. ____ (Nov. 15, 1984), the Judicial Officer withdrew inspection indefinitely from a packing plant, but suspended the sanction on condition that Alan Roessler was disassociated from the plant in 90 days and sold his stock within one year, and the plant did not commit designated offenses within 5 years.

Alan Roessler, respondent's president, treasurer and principal stockholder, had been convicted of the felony of receiving a truckload of hijacked beef and processing it through a packing plant which he managed (respondent's predecessor), with knowledge that it was stolen. Mr. Roessler was subsequently convicted of a misdemeanor because when he applied for Federal inspection for the newly established Norwich Beef Company, he answered "none" to questions with respect to whether he had previously been convicted of any crimes.

Since the felony relating to hijacked beef did not strike at the heart of the meat inspection program, the Judicial Officer considered all of the circumstances presented in the case, including mitigating circumstances, before concluding that respondent was unfit to receive inspection because of the felony conviction, so long as Alan Roessler was associated with the firm. (A similar, recent case is *In re Apex Meat Co.*, 44 Agric. Dec. ____ (September 5, 1985), *appeal docketed*, No. 85-3189 (D.D.C. Oct. 4, 1985)). When considering the other circumstances, he held that other unfavorable circumstances must be considered, as well as respondent's mitigating circumstances, including the fact that respondent had committed a single misdemeanor, which would not, by itself, afford a jurisdictional basis for withdrawing inspection. The Judicial Officer stated (38 Agric. Dec. at 394-96):

However, inspection services are not to be withdrawn automatically because of the conviction of a felony. The felony must be of such nature as to support a finding that the recipient is "unfit to engage in any business requiring inspection" as a result of that felony (21 U.S.C. 671).

Dr. Hatter explained that meat inspectors cannot continuously observe all of the processing activities at a plant and, therefore, the inspection service must be able to

depend upon the reliability and integrity of the plant management to be assured that the health and welfare of consumers will be protected. Such reliability and integrity are lacking here. Specifically, he testified (Tr. 23, 39-43):

Q. Is there anything specifically about the way the meat inspection system works and the way the business works that creates a need for this type of integrity that you are talking about?

A. Yes, because in this role we do not have and cannot have enough inspectors observing every operation that is going on, on a daily basis. We have inspectors that cover the sausage formulation, for example, where you have in one section the receiving cooler of fresh meats, then you have the formulation, you have the spice room, which is all taking place, and then emulsion and stuffers. These are all taking place simultaneously so, therefore, we have to have the reliability, the integrity of the plant management to be assured that when the inspector is not there to observe the actual procedure, that it will be carried out according to the rules and regulations.

* * * * *

Q. Dr. Hatter, the evaluation of these applications which come into our office, would an indication in response to these Blocks 19 and 20, that an individual associated with the organization was—would an indication that such an individual have been convicted of a crime of larceny who was associated with the organization cause any particular concern on your part concerning the integrity of that facility and that operator?

A. Yes, because the integrity, honesty and dependability of the applicants, including the operation of the plant itself, is solely dependent upon the individuals within that plant to abide by the rules and regulations of when and when not the inspector might be on the premises, so that the matter of records, the formulation, the restricted ingredients going [into] each product would be car-

ried out depending upon the integrity of plant management.

* * * * *

Q. If, on the same application, you were informed that an individual connected with the applicant had been convicted of the crime of selling and transporting meat under grant of inspection obtained through false representations, would this cause you any particular concern?

A. Yes, it would because of what I had mentioned previously, the dependability that we rely on plant management to carry out all the rules and regulations as far as their operations, both in sanitation and in their preparation of meat and meat food products, and unless we have this, we cannot depend on it, and this certainly would indicate that it was in doubt as far as the larceny type of situation.

* * * * *

Q. Now, Doctor Hatter, based on your familiarity with these documents, your understanding of the purpose of Section 401 of the Meat Inspection Act and your own experience and responsibilities within the Meat and Poultry Inspection Programs, have you formed an opinion as to whether the Respondent in this action should be allowed to continue to obtain the benefit of meat inspection services?

A. Yes, I do.

* * * * *

Q. And what is that opinion, Doctor?

A. That based on the evidence that we have before us, that the Norwich Beef Company as an operator under Federal inspection, puts the total program into jeopardy in that the consumer, who we service or protect as far as the final product reaching their table, loses confidence in the reliability when we permit the type of operation to be

operated by the individuals who have been so convicted of a felony and a misdemeanor in this case.

Q. When you talk about integrity, do you feel that because of these convictions, sir, that your program can place any reliability on Norwich Beef Company?

A. No, especially since the application was falsely made out, without giving us proper documentation. Certainly, we don't have the reliability or the integrity needed as far as the plant's operation.

Q. Doctor Hatter, is there any action which the Respondent in this action might take which, in your opinion, would allow them to continue to receive Federal inspection services?

* * * * *

A. Yes. Norwich Beef could continue if Mr. Alan Roessler, who was convicted of the felony and the misdemeanor, would remove himself from the stockholders plus any contact with the operation of Norwich Beef Company, and that Norwich Beef would be on probation for a period of time.

The Federal inspector who inspects meat products at respondent's plant is at the plant only about 80% of the time since he inspects at two other plants besides respondent (Tr. 45). Also, even when he is at respondent's plant, he cannot watch all operations at the same time. Hence unless the inspection service can depend upon the reliability and integrity of respondent's management, it cannot protect the "public interest * * * by assuring that meat and meat food products distributed to them [from respondent's plant] are wholesome, not adulterated, and properly marked, labeled, and packaged" (21 U.S.C. 602).

The convictions of Alan Roessler provide a reasonable basis for the view of the administrative officials that they cannot depend upon the reliability or integrity of respondent so long as Alan Roessler is associated with the firm.

Alan Roessler has been convicted of two crimes relating to the profitability of meatpacking companies. I infer that

the first crime was committed with the expectation of profit, and that restitution was later made to lessen the criminal penalty. The second crime obviously involved the profitability of respondent's meatpacking business since it was committed to obtain inspection, which is indispensable to the operation of respondent's plant.

Although only the felony conviction affords a jurisdictional basis for withdrawing inspection services from respondent, once the jurisdictional basis is met consideration can be given to any other relevant circumstances, favorable and unfavorable. Accordingly, it is appropriate to consider the evidence offered by respondent that aside from the two convictions, Alan Roessler's reputation in the community is good, and he has conducted himself and his business affairs in a responsible and exemplary manner. On the other hand, it is appropriate to consider that Alan Roessler was willing to commit a second crime to obtain inspection services for his plant.

Considering all of the circumstances, there is a reasonable basis for the belief of the administrative officials that respondent is unfit to receive inspection services because of Alan Roessler's felony conviction so long as Alan Roessler is associated with the firm.

On appeal, Chief Judge Clarie upheld the Decision and Order of the Judicial Officer (*Norwich Beef Co. v. Bergland*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982). The Chief Judge agreed with the Department's "logic, which equates lack of integrity and dependability with unfitness to engage in a business requiring inspection" (slip op. at 7). In upholding the Judicial Officer's Decision and Order, the court stated (slip op. at 6-8):

Section 671 does not automatically disenfranchise all convicted felons from engaging in the meat processing business. It clearly defers to the discretion of the Secretary, who may withdraw inspection services if, after a hearing, he determines that the recipient of such services is unfit to engage in any business requiring inspection. The plaintiffs contend that the Secretary's decision in this case, as rendered by the Judicial Officer, was arbitrary, capricious, and an abuse of discretion. In support of this contention, the plaintiffs argue that a conviction, alone, will not justify a finding of "unfitness." The Court notes, first,

that although this inquiry is to be "searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). See also *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974). Second, the Judicial Officer's decision did not simply equate a felony conviction with "unfitness." There was testimony at the hearing by the Regional Director of the USDA, to the effect that there is an insufficient number of inspectors to observe all of the processing activities at a given plant and, therefore, the inspection service relies heavily "upon the reliability and integrity of the plant management to be assured that the health and welfare of consumers will be protected." *In re Norwich Beef Company, Inc.*, FMIA Docket No. 29, at 23-24 (Mar. 7, 1979). The Court can find no fault with that logic, which equates lack of integrity and dependability with unfitness to engage in a business requiring inspection. The plaintiffs argue, in reply, "Hypothetically, a person may lack integrity and dependability and still sell an excellent and outstanding food product which poses no threat to the consuming public." While this proposition may well be true, the Secretary is not required to run the risk that it may, instead, be false. Nor is it an abuse of discretion for him to conclude that, at least, in this case, it is false; and that the consuming public will be safer if the plaintiff, Roessler, is not permitted to operate a meat processing business. The Court is cognizant of the public's great interest in the purity of food. *Smith v. California*, 361 U.S. 147, 152 (1959).

Next, the plaintiffs claim that the sanction imposed was unduly harsh, in view of previous sanctions. This same claim was made, unsuccessfully, in the case of *Butz v. Glover Livestock Commission Co., Inc.*, 411 U.S. 182 (1973). "The employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases." *Id.* at 187. See also *Wright v. Securities & Exchange Commission*, 112 F.2d 89, 95 (2d Cir. 1940). The Secretary's decision, as rendered by the Judicial Officer, may seem overly harsh in that it may bar plaintiff Alan Roessler from employment with plaintiff Norwich Beef Company. However it is consistent with a principle

expressed by the United States Supreme Court in the case of *United States v. Park*,

"The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are not more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them."
United States v. Park, 421 U.S. 658, 672 (1975).

3. *Wyszynski Provision Company*.

In *In re Wyszynski Provision Co.*, 40 Agric. Dec. 17 (1981), *aff'd*, 538 F. Supp. 361 (E.D. Pa. 1982), the Judicial Officer withdrew meat inspection service indefinitely from respondent, but suspended the withdrawal on the condition that Walter J. Wyszynski became disassociated from respondent within 90 days and sold his stock within one year, and respondent did not violate the Meat Inspection Act within 3 years.

The withdrawal of inspection service was based on the fact that Walter J. Wyszynski was convicted of three felony counts, and respondent of eight felony counts, all involving the sale of adulterated meat. Sodium sulfite, a prohibited substance, had been surreptitiously added to sausage to make it appear fresher than it was. In *Wyszynski*, the Judicial Officer followed the *per se* approach set forth in *Utica* and *Toscony*, discussed in subsections 4 and 5, *infra*, and held that the felony convictions required a determination that respondent is unfit to receive inspection service, irrespective of mitigating circumstances, so long as Walter J. Wyszynski is associated with respondent. The Judicial Officer stated (40 Agric. Dec. at 22-24):

In the *Utica Packing Company* case referred to above, it was held that where the respondent's president and half-owner was convicted under 18 U.S.C. § 201(b) of bribing the supervisor of the meat inspectors at respondent's plant on four separate occasions, a determination must be made that the respondent is unfit to receive inspection service. Specifically, it was held (39 Agric. Dec. at 602):

* * * * *

Although the felony convictions involved in the present case are not quite as serious as those involved in *Utica*,

the felony convictions here strike at the heart of the meat inspection program and similarly require a determination that the respondent is unfit to receive inspection service.

In the present case, sodium sulfite, a prohibited substance, must have been surreptitiously added by Mr. Walter J. Wyszynski when the inspector was not present. The inspector at respondent's plant inspects meat at two or three plants and therefore he is not at respondent's plant all day. Although there is no contention that the meat involved in the violations in this case was putrid or decomposed (the meat was not tested in this respect), the addition of sodium sulfite makes meat look fresh even after it is too old to be eaten safely. The retailer or ultimate consumer could mishandle a meat product containing sodium sulfite and be unaware that the product was no longer safe to eat because it would still look fresh (Tr. 37, 107).

. . . Because of the nature of the felonies involved in this case, I have no alternative but to conclude that respondent is unfit to engage in any business requiring inspection under the Federal Meat Inspection Act.

Here, as in the *Utica* case, in view of the nature of the felony convictions involved in this proceeding, it is not appropriate to consider other facts and circumstances as to respondent's reputation in the community or as to present conditions at their plant. As stated in *Utica* (39 Agric. Dec. at 602-03):

* * * * *

The same reasoning applies to the present felonies which occurred when Mr. Wyszynski surreptitiously added a prohibited substance to meat products when the inspector was not present.⁴

In addition, it is not appropriate to consider whether it is likely that respondent will again commit a similar felony. As stated in *Utica* (39 Agric. Dec. at 603-04):

⁴ Perhaps the only felonies that would compel a finding that a plant is unfit to receive inspection under the Act without regard to any other circumstances are those involving bribery and related offenses or the surreptitious thwarting of the work of the Federal personnel. But I would not foreclose the possibility of other cases demonstrating that other felonies belong in the same category.

As shown in the quotation above, note 4, the Judicial Officer indicated that the *per se* approach was being followed at present only in cases "involving bribery and related offenses or the surreptitious thwarting of the work of the Federal personnel." Although the Judicial Officer applied the *per se* approach in *Wyszynski* without regard to respondent's mitigating circumstances, he stated in *dicta* that "even if the [mitigating] circumstances relied on by respondent were relevant, they would not lead me to change the order in this case" (40 Agric. Dec. at 25). The mitigating circumstances relied on by respondent included the fact that "neither the corporation nor its principals had previously or subsequently been arrested, convicted of any crime or involved in difficulty with the Department of Agriculture" (40 Agric. Dec. at 25); respondent had been "punished enough by its criminal fines and the adverse publicity resulting from the criminal convictions" (40 Agric. Dec. at 26); and the "meat in question was not contaminated or putrid" (40 Agric. Dec. at 26).

On appeal to the district court, the court referred to the fact that the Judicial Officer's *per se* approach had been upheld by the district court on appeal in the *Utica* case (discussed in subsection 5(b), *infra*), but the court disagreed with the district court's holding in *Utica* that mitigating circumstances were irrelevant and immaterial. *Wyszynski Provision Co. v. Sec. of Ag.*, 538 F. Supp. 361, 364 (E.D. Pa. 1982). The court, however, significantly undercut the importance of mitigating circumstances where the conviction strikes at the heart of the meat inspection program by holding (*ibid.* 371):

However, whether or not a conviction is in and of itself "substantial evidence" varies with the nature of the predicate felony or the repeated violations of law. The more closely the conduct strikes at the policies of the Act, the more likely it alone will support a determination of unfitness regardless of mitigating facts.

The following excerpt summarizes the district court's views (538 F. Supp. at 362-65):

The Administrative Law Judge ("ALJ") [who is the same ALJ involved in the present case] held the required hearing on complaint of the United States Department of Agriculture ("USDA") and found *Wyszynski* and the Company unfit within the meaning of the Act because of their felony convictions. . . . She granted the request of the USDA that inspection services be indefinitely withdrawn and denied to the Company provided that such withdrawal and denial would cease for so long as *Wyszynski* is not associat-

ed with the Company, its successors or assigns, directly or indirectly, as partner, officer, director, shareholder or employee and does not control it in any way, and the Company does not violate any provision of the Act within three years. However, the decision and order made clear that the ALJ, citing *In Re Norwich Beef Co.*, 38 Agric. Dec. 380 (1979), deemed she had no discretion upon establishing the felony convictions for violating the Act other than to find respondent unfit, notwithstanding the discretionary authority invested in the Secretary by the Act. However, in the event on appeal it were decided that discretion did lie with the ALJ, she found various mitigating factors² on account of which she stated she would have otherwise recommended suspension of the indefinite withdrawal and denial of services so long as the Company and Wyszynski did not violate the Act individually or collectively.

² The ALJ deemed mitigating the following circumstances. adequate punishment in the criminal proceedings; the guilty pleas involved one isolated event of addition of sulfites to make meat appear fresher; the meat was not contaminated or putrid; the adverse publicity caused loss of business to the Company and humiliation to Wyszynski; none of the principals had been previously convicted of crime; this long established business had never been in difficulty with governmental authorities nor had licensing problems with the USDA, there are 25 employees, 12 of whom are non-family members, all employees of long standing; Wyszynski has resigned as officer, director and shareholder and is working in a non-executive menial capacity having no relation to meat preparation; the severance of Wyszynski from the Company is based only on the felony convictions and there is no evidence of record that this would further the purposes of the Act or serve as any further deterrent

The Company appealed the ALJ's decision to the Judicial Officer ("JO") of the USDA. He affirmed the ALJ and held that in view of the felony convictions, mitigating circumstances could not be considered in a determination of fitness. He concluded in the alternative that even if the mitigating circumstances were relevant, they would not change his final determination on the facts of this case; FMIA Docket No. 41, Paper 19.

* * * * *

. . . The following errors of law are cited: (1) deeming a felony conviction to automatically compel a finding of unfitness within the meaning of the Act; (2) failing to consid-

er mitigating circumstances; and (3) substituting findings of fact by the JO for those by the ALJ.

* * * * *

Upon review of the whole record and separate consideration of each of these standards, see, *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974), we find that the Secretary's decision was neither arbitrary or capricious nor unsupported by substantial evidence. In light of plaintiff and Wyszynski's convictions for adulterating meat and the explicit provisions of § 671 regarding felony convictions as a basis for withdrawing meat inspection services, it is difficult to hold otherwise.

Congress has declared that conviction of either: "1) any felony, or 2) more than one violation of any law . . . based upon the acquiring, handling or distributing of unwholesome, mislabeled, or deceptively packaged food or upon fraud in connection with transactions in food" may provide the basis for a withdrawal of inspection services if the Secretary determines after opportunity for hearing that the recipient is unfit to engage in any business requiring inspection. 21 U.S.C. § 671. The JO found that plaintiff had been convicted of multiple felonies that "strike at the heart of the meat inspection program." These felonies were based upon distributing mislabeled food or fraud in connection with transactions in food. He found that Wyszynski added sodium sulfite to meat surreptitiously when inspectors were absent and considered that Wyszynski had been convicted of felonies with "intent to defraud." Plaintiff's actions of record provided adequate evidence to support a finding of unfitness under the standards set out in § 671.

Plaintiff argues that the action of the JO was arbitrary and capricious in failing to consider relevant mitigating circumstances, and illegal in determining that a finding of unfitness was mandated by plaintiff's convictions of felonies. But the JO made no automatic finding. He recognized that "not every felony conviction renders the recipient unfit to receive inspection service," but certain felony convictions in and of themselves justify a finding of unfitness as they did in this case. He relied on *In Re Utica Packing*

Co., 39 Agric. Dec. 590 (1980), an administrative decision ordering suspension of a meat packing company unless it dissociated with its President who had been convicted of bribing a federal inspection supervisor. The district court in *Utica*, affirming the decision of the Secretary, held that present compliance and good character were irrelevant, but that all plaintiff's evidence, even if relevant, was insufficient to render insubstantial the evidence on which the Secretary based his decision to suspend; *Utica Packing Co. v. Bergland*, 511 F.Supp. 655 (E.D.Mich.1981). We respectfully differ with the district court in *Utica* only to this extent: mitigating facts are not immaterial or irrelevant and may⁸ be considered. However, whether or not a conviction is in and of itself "substantial evidence" varies with the nature of the predicate felony or the repeated violations of law. The more closely the conduct strikes at the policies of the Act, the more likely it alone will support a determination of unfitness regardless of mitigating facts.

In this case the JO considered the mitigating facts listed by the ALJ⁴ although he accorded little or no weight to them. He decided to accord little weight to these mitigating facts because the felonies here involved wilful adulteration. He considered that sodium sulfite added to the meat makes it look fresh when it is not and this creates a danger that a retailer may sell or a consumer may eat a product no longer wholesome. In his view such action, even on one occasion (affecting more than one sale) was of such a nature and scale to warrant the administrative action sought by the Secretary. Therefore, the court cannot find that the final determination of the agency was arbitrary or capricious. While we might reach a different decision on these facts were we to consider the matter *ab initio*, where there is no clear error, we cannot substitute our judgment for that of the agency given discretionary authority. *Overton Park, supra*. The determination of the USDA, charged as it is with enforcement of the Act and

⁸ The use of "may" was obviously euphemistic. Since the court differed with the Judicial Officer and the *Utica* district court's view that mitigating circumstances were irrelevant and did not have to be considered, the court obviously meant that mitigating circumstances "must" be considered. The court, however, gave no reasons for, in effect, holding that it is arbitrary and capricious to refuse to consider mitigating circumstances in those cases where the convictions strike at the heart of the meat inspection program.

the protection of the public health, is entitled to considerable deference. See, *Philadelphia Citizens in Action v. Schweiker*, *supra* at 886.

⁴ Thus, the plaintiff's third argument, that the JO substituted his findings of fact for those of the ALJ, is without basis; he determined that on these facts the felony convictions alone warranted a finding of unfitness, but if there were agency discretion, he would exercise that discretion differently than would the ALJ on the facts found by the ALJ.

Accordingly, although the district court in *Wyszynski* disagreed with the Department's *per se* approach, it significantly undercut the effect of its disagreement by holding that the "more closely the conduct strikes at the policies of the Act, the more likely it alone will support a determination of unfitness regardless of mitigating facts" (538 F. Supp. at 364). In addition, as shown in the next subsection, the district court reviewing the *Toscony* decision expressly agreed with the Judicial Officer's *per se* approach in *Wyszynski*, and upheld the use of the *per se* approach in *Toscony* based upon the Judicial Officer's *Wyszynski* decision.

4. *Toscony Provision Company*.

In *In re Toscony Provision Co.*, 40 Agric. Dec. 533 (1981), *aff'd*, 538 F. Supp. 318 (D.N.J. 1982), *remanded by consent*, No. 82-5354 (3d Cir. Dec. 27, 1982), *decision on remand*, 43 Agric. Dec. ____ (May 18, 1984), *order denying late appeal*, 43 Agric. Dec. ____ (July 12, 1984), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished), the Judicial Officer withdrew meat inspection service indefinitely from respondent, but suspended the withdrawal on condition that Henry Dei became disassociated from respondent within 90 days and sold his stock within one year, and respondent did not violate the Meat Inspection Act within 2 years.

The withdrawal of inspection service was based on the fact that respondent and Henry Dei, its president and principal stockholder, were each convicted of a single felony, knowingly distributing adulterated meat food products, *viz.*, sausage to which an industrial chemical, imidazole, had been added. The chemical masks the aging or spoilage of the product, and, therefore, could cause harm if a retailer or consumer held the product too long because of its fresh appearance. The chemical was added without the knowledge of the meat inspector assigned to the plant.

In *Toscony*, the Judicial Officer adopted the decision of the ALJ, which followed the *per se* approach previously set forth by the Judicial Officer in *In re Wyszynski Provision Co.*, 40 Agric. Dec. 17 (1981), *aff'd on other grounds*, 538 F. Supp. 361 (E.D. Pa. 1982), dis-

cussed immediately above. Based on *Wyszynski* (and other cases), the ALJ held that the felony convictions, which strike at the heart of the meat inspection program, *required* a determination that respondent was unfit, irrespective of mitigating circumstances, so long as Henry Dei was associated with respondent. No consideration was given to Toscony's mitigating circumstances, even by way of *dicta*. The ALJ's decision, adopted by the Judicial Officer, states (40 Agric. Dec. at 535, 537-38):

This case is controlled by recent decisions by the Judicial Officer: *In re Utica Packing Co.*, 39 Agric. Dec. 590 (1980); *appeal docketed*, No. CA-80-7242 (E.D. Mich., July 25, 1980); *In re Norwich Beef Co.*, 38 Agric. Dec. 380 (1979), *affirmed*, H79-210 (D. Conn. Feb. 6, 1981); and *In re Wyszynski Provision Company*, [40] Agric. Dec. [17] (Feb. 13, 1981). [Footnote omitted.] *Wyszynski* is on all fours and requires the finding that respondent is unfit to engage in any business requiring inspection under the Federal Meat Inspection Act.

* * * * *

Issue

Is respondent unfit to engage in any business requiring federal meat inspection services?

Conclusion

The respondent is unfit to engage in any business requiring federal meat inspection under the holding in *Wyszynski Provision Company*, *supra*, attached at Appendix "A".

As was the case in *Wyszynski*, respondent and a principal corporate officer were convicted of felonies of the sort which "strike at the heart of the meat inspection program and . . . require a determination that the respondent is unfit to receive inspection service"; *ibid*, page 9.

Both proceedings involve the surreptitious adulteration of sausages through the addition of chemicals to make "old" product look fresh. Such practices can result in the sale and consumption of product no longer safe to eat, *ibid*, page 10.

"(I)n view of the nature of the felony convictions involved in this proceeding, it is not appropriate

to consider other facts and circumstances as to respondents' reputation in the community or as to present conditions at their plant." *Ibid*, page 11.

"(I)t is not appropriate to consider whether it is likely that respondent will again commit a similar felony." *Ibid*, page 12.

"(T)he Act indicates that a single felony may be the basis for a finding of unfitness to receive inspection, and the felonies involved in this proceeding are of such a nature as to compel the determination that respondent is unfit to receive inspection." *Ibid*, page 14.

The first proceeding under the Act to result in the withdrawal of inspection services from a recipient because of a prior felony conviction was *Norwich Beef Co.*, 38 Agric. Dec. 380 (1979), *affirmed*, H79-210 (D. Conn. Feb. 6, 1981). In affirming this decision, Chief Judge Clarie found it to be in keeping with a long and established line of federal cases which have upheld the exclusion of convicted felons from employment where the public interest requires insurance against corrupt practices (Appendix "B", page 5), and held, at page 7:

"The Court can find no fault with that logic, which equates lack of integrity and dependability with unfitness to engage in a business requiring inspection. The plaintiffs argue, in reply, 'Hypothetically, a person may lack integrity and dependability and still sell an excellent and outstanding food product which poses no threat to the consuming public.' While this proposition may well be true, the Secretary is not required to run the risk that it may, instead, be false. Nor is it an abuse of discretion for him to conclude that, at least in this case, it is false; and that the consuming public will be safer if the plaintiff . . . is not permitted to operate a meat processing business. The Court is cognizant of the public's great interest in the purity of food. *Smith v. California*, 361 U.S. 147, 152 (1959)."

In *Wyszynski*, the Secretary of Agriculture has decided, I believe most properly, to not subject the health of consum-

ers to the consequences of an imperfect act of contrition by a meat processor convicted of a felony involving wilful and knowing adulteration of meat food products.

On appeal, Senior Judge Whipple upheld the Department's *per se* approach, holding that since the felony convictions "clearly contravene the purposes of the Federal Meat Inspection Program, it is neither appropriate nor necessary to consider other facts and circumstances, such as the plaintiff's reputation in the community or conditions at the plant." *Toscony Provision Co. v. Block*, 538 F. Supp. 318, 321 (D.N.J. 1982).

The court's decision in *Toscony*, which was issued after the Judicial Officer's decision in *Wyszynski*, discussed immediately above, but before the district court upheld *Wyszynski* on other grounds, completely agrees with the Judicial Officer's *per se* ruling in *Wyszynski*. In affirming the Judicial Officer's *per se* approach in cases where the offenses "clearly contravene the purposes of the Federal Meat Inspection Program," the court held (538 F. Supp. at 320-21):

The record is clear and simple and requires no further factual analysis to determine the basis of the Administrative Law Judge's and the Judicial Officer's decisions. The decisions were based upon the single fact of the convictions of *Toscony* and *Henry Dei* for distributing adulterated meat in violation of 21 U.S.C. § 602. Therefore, the only review that is required is whether that single factor is sufficient to support the finding that the respondent is unfit to engage in any business requiring federal meat inspection services.

* * * * *

Finally, the Secretary relies most heavily upon *Wyszynski Provision Co., Inc. v. Bergland*, 39 Agric. Dec. (Feb. 13, 1981) *appeal pending*, No. 81-816 (E.D. Pa. 1982) which was cited as being "on all fours" with the case at hand.

In *Wyszynski*, the company's vice-president, Walter Wyszynski, pled guilty to adding a prohibited "meat freshener" to sausage. The Secretary withdrew inspection services indefinitely, to be suspended upon Mr. Wyszynski's disassociation with the firm. The *Wyszynski* opinion clearly stands for the proposition that although it was never Congress' intent to disenfranchise someone solely because of any felony conviction, if the felony is one that "strikes at the

heart of the meat inspection program" it requires a determination of unfitness.

Therefore, as in *Wyszinski*, because the nature of Mr. Dei's and Toscony's offenses is such that they clearly contravene the purposes of the Federal Meat Inspection Program, it is neither appropriate nor necessary to consider other facts and circumstances, such as the plaintiff's reputation in the community or conditions at the plant. *Wyszinski* at 11.

Accordingly, the Administrative Law Judge's and Judicial Officer's reliance upon the fact of these convictions in order to find unfitness cannot be said to be arbitrary, or capricious or an abuse of discretion or in any way contrary to law. Furthermore, it cannot be said to be unsupported by substantial evidence in the record.

On appeal of *Toscony* to the United States Court of Appeals, the court granted a motion filed by the government (in which it was stated that counsel for Toscony joins in the motion) to remand the matter to USDA for consideration of mitigating circumstances. *Toscony Provision Co. v. Block*, No. 82-5354 (3d Cir. Nov. 19, 1982). The motion was filed by the Assistant United States Attorney handling the case for the Secretary of Agriculture and the United States because of an unpublished decision by the Sixth Circuit holding that mitigating circumstances must be considered. *Utica Packing Co. v. Bergland*, No. 81-1383 (6th Cir. Sept. 2, 1982), discussed in subsection 5(c), *infra*. The Assistant United States Attorney did not advise USDA that such a motion was to be filed. The court granted the motion filed by the government without ruling on whether a remand was necessary or appropriate. That is, the court expressed no opinion as to whether it agreed with the lower court opinion being reviewed or whether it agreed with the contrary view of the Sixth Circuit.

Based upon the voluntary decision of the Assistant United States Attorney to have the mitigating circumstances considered, and the court's remand order granting the government's request to have the proceeding remanded, the ALJ who issued the initial ruling in the case held that respondent was unfit to receive inspection because of the felonies, and that the mitigating circumstances were not sufficient to change the result in the case. *In re Toscony Provision Co.*, 43 Agric. Dec. ____ (May 18, 1984).

Toscony appealed to the Judicial Officer, but inasmuch as the appeal was filed late, after the ALJ's decision had become final and effective, the Judicial Officer held (in accordance with many prior

decisions) that he had no jurisdiction under the Department's rules of practice to hear the appeal. Nonetheless, in order to obviate the need for a further remand in case a reviewing court should disagree with the Judicial Officer's jurisdictional ruling as to the late appeal, the Judicial Officer indicated that if the appeal had not been filed late, he would have adopted the ALJ's initial decision. The Judicial Officer stated (*In re Toscony Provision Co.*, 43 Agric. Dec. ____, slip op. at 6-7 (July 12, 1984):

Respondent has indicated that an appeal will be taken from an order denying permission to file a late appeal. Accordingly, in an effort to avoid undue delay in this proceeding (which involves the public health), in the event that a court should disagree with my order denying a late appeal, I have re-read the original record in this proceeding, and have read the supplementary record made after my original decision in this proceeding. If an appeal had been timely filed, I would have adopted Judge Palmer's initial Decision and Order as the final Decision and Order in this proceeding, adding additional conclusions emphasizing that I give little or no weight to any of the circumstances regarded by respondent as mitigating. Respondent has a great volume of evidence alleged to be mitigating, but the great volume is of no consequence since each item has little or no weight. Even a thousand times zero is still zero!

This is not a close case. In fact, the circumstances regarded by respondent as mitigating are of such little weight that I would have regarded an appeal almost as frivolous, or solely for delay. Additional briefs on appeal would not have been helpful in view of the thorough briefing of the mitigation issue by counsel in the briefs filed below. Oral argument before the Judicial Officer, if requested, would have been denied. It is the practice of the Judicial Officer to hear oral argument on appeal only on very rare occasions where it is regarded as helpful.

Accordingly, if a court should disagree with my procedural ruling, perhaps the case could be decided on the basis of the Administrative Law Judge's initial Decision without the delay incident to a further remand to the Department.

On appeal to the district court for the second time, but to a different United States District Judge (Judge Ackerman), the court

(erroneously, I believe) reviewed the merits despite respondent's late appeal to the Judicial Officer. The court affirmed the order withdrawing inspection services indefinitely, unless Henry Dei was disassociated from the plant, stating (*Toscony Provision Co. v. Block*, No. 81-1729, slip op. at 13-17 (D.N.J. Mar. 11, 1985)):

On remand, after a full hearing on the question of mitigating circumstances, Judge Palmer reiterating his prior conclusion in this regard stated: The entire record, the briefs and arguments by Counsel have been fully considered to determine the appropriate sanction that should be imposed in this proceeding. I have concluded that respondent and Mr. Dei's felony convictions for knowingly distributing adulterated meat strike at the very heart of the Federal meat inspection program, and the mitigating circumstances of Mr. Dei's otherwise excellent reputation among business, professional, and social acquaintances and virtually blemish-free record both before and since the felonies is not sufficient to allow inspection service to continue at respondent's plant unless Mr. Dei disassociates himself from the corporation and divests himself of all its stock that he owns. See the transcript T-27 at Page 4.

After making findings of fact and conclusions of law, Judge Palmer concluded as follows: I have followed the Department's policy and have determined that despite the fact that Henry Dei otherwise has an excellent reputation among his professional, social, and business associates, he has nonetheless committed one of the most egregious violations imaginable under the Meat Inspection Act. He endangered the physical health and well-being of respondent's customers by his surreptitious addition of a deleterious chemical substance to the sausage prepared and distributed by his company. The criminality of this conduct far outweighs his otherwise excellent reputation and respondent's otherwise good record both before and since. Therefore, Federal meat inspection should be withdrawn unless Henry Dei becomes disassociated with the plant. See the transcript T-27 at Page 10.

In dismissing plaintiffs' appeal and denying their Motion for leave to appeal out of time, the Judicial Officer, as noted supra, considered the merits so as to avoid the neces-

sity for a remand should a Federal Court reach the merits as I have. . . .

* * * * *

While I do not agree that Mr. Dei's reputation in the business community and among his family and friends as well as his "blemish-free record" both before and after the crimes for which he was convicted should be weighed as a "zero" against his conviction in determining fitness under the Act, I find that the Secretary's decision that plaintiff's job-related conviction outweighed the evidence of mitigating circumstances is neither arbitrary nor capricious on the record before me.

While the record is replete with evidence of Plaintiff Dei's good character, there can be no argument that the felony conviction in question is job-related and thus at the heart of any determination of fitness under the Act. Although the Act permits withdrawal of inspection services by the USDA upon conviction of any felony where there is a finding of unfitness, this is not just *any* felony. I agree that it would be improper for the Secretary to equate another sort of felony conviction with unfitness automatically. Here, however, the Secretary was presented with a felony conviction for willfully distributing adulterated meat products. More than impressive character testimony is necessary to outweigh the implications of unfitness which inhere in a job-related conviction such as the instant one.

I recognize that Plaintiff Dei is in the "twilight" of his business career at age 75. I recognize as well that Plaintiff Toscony Company needs Mr. Dei as much as he needs it. I recognize, too, that in light of these facts and the mitigating evidence introduced at the hearing the sanctions imposed are severe insofar as he is concerned. I am not unsympathetic to Mr. Dei, but I am compelled to conclude that the sanctions imposed are neither arbitrary or capricious in light of the record herein and the public's interest in health and maintaining high standards of food preparation and distribution which are reflected in the Act.

As shown above, the first district court decision in *Toscony* is a square holding affirming the Judicial Officer's *per se* approach where the felony conviction strikes at the heart of the meat inspec-

tion program. The second district court decision in *Toscony*, which resulted from a voluntary decision by the Assistant United States Attorney to have the case remanded for consideration of the mitigating circumstances, is a significant holding that it is not arbitrary or capricious for USDA to determine that more than impressive character testimony and blemish-free record before and after the felony involved is required to outweigh the implications of unfitness which inhere in a "job related" conviction that strikes at the heart of the meat inspection program.

5. *Utica Packing Company.*

The *Utica* case evoked seven separate decisions, which must be reviewed in sequence in order to understand fully and interpret properly the views set forth in later decisions.

(a) Judicial Officer's Original Utica Decision.

In *In re Utica Packing Co.*, 39 Agric. Dec. 590 (1980), *aff'd*, 511 F. Supp. 655 (E.D. Mich. 1981), *remanded*, 705 F.2d 460 (6th Cir. 1982) (unpublished), *decision on remand*, 43 Agric. Dec. ____ (Nov. 18, 1982), *final decision on reconsideration*, 43 Agric. Dec. ____ (Mar. 20, 1984), *aff'd*, No. 80-72742 (E.D. Mich. Mar. 12, 1985), *reversed and remanded*, No. 85-1324 (6th Cir. Jan 13, 1986), the Judicial Officer withdrew meat inspection service indefinitely from respondent, but suspended the withdrawal on the condition that David Fenster became disassociated from respondent within 90 days and sold his stock within one year.

The withdrawal of inspection was based on the fact that David Fenster, respondent's president and half owner, was convicted of four felonies under 18 U.S.C. § 201(b) ⁹ for corruptly giving \$200 on

⁹§ 201. *Bribery of public officials and witnesses*

. . . .

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty . . .

. . . .

four separate occasions to Dr. Reed, the supervisor of five or six lay meat inspectors, who, together with Dr. Reed, inspected meat at respondent's plant. *United States v. Fenster*, 449 F. Supp. 435 (E.D. Mich. 1978). The felony convictions involved proof that the payments were made to influence inspection at the plant, i.e., to reduce the number of line-stoppages by the inspectors, and to give respondent the benefit of the doubt with regard to hogs of questionable soundness. (As in the present case, Dr. Reed contacted other authorities and was equipped with a concealed tape recorder which recorded David Fenster's payment conversations.)

Even though the felonies occurred before the Department issued its *per se* Policy Statement relating to bribery and related offenses (see subsection 1, *supra*), the Judicial Officer applied a *per se* approach since the felonies struck at the heart of the meat inspection program, and refused to consider respondent's mitigating circumstances. Moreover, he did not indicate even by way of *dicta* his views as to the mitigating circumstances, so a remand would be necessary in the event a reviewing court disagreed with his *per se* approach.¹⁰

The Judicial Officer adopted, in part, the ALJ's findings and conclusions, which referred to respondent's mitigating evidence as follows (39 Agric. Dec. at 598):

On the basis of a first reading of *Norwich*, respondent was permitted to introduce considerable evidence establishing that:

1. Mr. Fenster's reputation in his community, despite his conviction by the United States District Court, is excellent;
2. His bribing of the Veterinarian-Inspector was apparently aberrant behavior for him resulting from: a) serious health problems, b) exacerbation of old psychic injuries while a victim of the Nazi

Shall be fined not more than \$20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

¹⁰ The omission of such *dicta* here and in the first *Toscony* decision was purposeful, so that the Department could seek certiorari if the *per se* approach was reversed on appeal. However, since the Department did not avail itself of that opportunity, to obviate the need for a remand if the *per se* approach is again disapproved, in this case and all future cases (until the legality of the *per se* approach has been definitively decided), I will indicate my views as to the mitigating circumstances (as was done in *Wyszynski*).

Holocaust, and c) misapprehensions concerning the motivation of various inspectors who had undertaken stricter enforcement of Federal Meat Inspection Act requirements; and,

3. The problems which led to his aberrant behavior have largely disappeared leading the U.S. Veterinarian who serves as Area Supervisor to file an official report, on October 15, 1979, advising the Director of Meat and Poultry Inspection that the respondent plant had, since December of 1978, established "a clean meat program" and "now is producing very clean hogs and plant management can be proud of their product."

On subsequent readings of *Norwich*, however, I have become convinced that its essential holding renders immaterial the consequent finding that recurrence is unlikely because of the general excellence of Mr. Fenster's character and reputation and the elimination of the conditions and motivations which led to the commission of the felony.

In holding that the felony convictions involved in *Utica* prove that respondent is unfit to receive meat inspection, so long as David Fenster is associated with respondent, the Judicial Officer stated (39 Agric. Dec. at 602):

In the present case, respondent's president and half-owner was convicted under 18 U.S.C. § 201(b) of bribing the supervisor of the meat inspectors at respondent's plant on four separate occasions. The Court explained that 18 U.S.C. § 201(b) requires that the bribe be given "corruptly" to "influence a public official to depart from conduct deemed essential to the public interest." The Court stated that "[i]n light of these standards, the Court is satisfied that the facts established at trial bespeak beyond a reasonable doubt a violation of § 201(b)." [Footnote omitted.]

If a felony conviction by a person responsibly connected with the recipient of meat inspection service is ever to form the basis for a determination that the recipient is unfit to receive meat inspection service, the felony conviction in this case requires that determination. That is, unless the statutory language is meaningless and is never to be applied, it must be applied in this case. There can be no other type of felony conviction which would more clearly establish that the recipient is unfit to receive inspection

service than the conviction involved in the present proceeding. Since I believe that Congress meant what it said and intended for the discretionary authority to be applied in the case of some types of felonies, I have no alternative but to determine that the respondent is unfit to receive inspection service because of Mr. Fenster's felony conviction.

The Judicial Officer explained that mitigating circumstances would be relevant and would be considered in some cases, such as *Norwich* (hijacked beef), discussed in subsection 2, *supra*, but not in the case of bribery convictions which strike at the "heart of the meat inspection program." He stated (39 Agric. Dec. at 602-04):

In addition, in view of the nature of the felony conviction involved in this proceeding, it is not appropriate to consider other facts and circumstances as to Mr. Fenster's reputation in the community or as to present conditions at respondent's plant. Since Congress clearly indicated that some recipient of inspection service will be found unfit to receive inspection *because* a responsibly connected person was convicted of a particular felony, if that language is ever to be applied and given meaning it must be applied in this case. In this case the felony conviction by itself requires a determination that respondent is unfit to receive inspection service.

This is not inconsistent with the holding in *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 396 (1979) (attached as an appendix to this decision), . . . [*aff'd*, No. H79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982)], in which it was said:

Although only the felony conviction affords a jurisdictional basis for withdrawing inspection services from respondent, once the jurisdictional basis is met consideration can be given to any other relevant circumstances, favorable and unfavorable. Accordingly, it is appropriate to consider the evidence offered by respondent that aside from the two convictions, Alan Roessler's reputation in the community is good, and he has conducted himself and his business affairs in a responsible and exemplary manner. On the other hand, it is appropriate to consider that Alan Roessler was willing to commit a second crime to obtain inspection services for his plant.

In the *Norwich Beef* case, the felony which afforded the jurisdictional basis for withdrawing inspection service involved the receipt of a truckload of stolen beef. Since that felony is not directly involved with meat inspection, all of the facts and circumstances had to be considered to determine whether the recipient of meat inspection was unfit to receive inspection because of that type of felony conviction.

But in the present case, the felony conviction relates to the heart of the meat inspection program. Respondent's president and half-owner was convicted of "corruptly" giving money to the supervisor of the meat inspectors at respondent's plant under a statute which "is to discourage one from seeking an advantage of attempting to influence a public official to depart from conduct deemed essential to the public interest" (Finding 4, *supra*). In view of the type of felony involved in the present case, there is no need to consider any other circumstances in order to determine whether the conviction of this felony renders respondent unfit to receive inspection services.

It would similarly be inappropriate to consider whether it is likely that Mr. Fenster will again attempt to bribe a meat inspector. The statute indicates that at least in the case of some felonies, meat inspection is to be withdrawn *because* a responsibly connected person was convicted on one occasion of the felony. As stated above, if that statutory language is ever to be applied, it must be applied here.

In effect, respondent wants a second chance before the remedial provisions of the Act are applied. But even where the public health is not involved, *i.e.*, where licenses are suspended or revoked for violations of other regulatory statutes, the second chance doctrine does not apply where a violation was wilfully committed. 5 U.S.C. § 558(c).

Where a serious and wilful violation of a regulatory statute administered by this Department is found to have been committed, it is the consistent policy of this Department to impose a remedial sanction without regard to the respondent's present compliance with the Act and without making any determination that it is likely that respondent will

again violate the Act in the future.⁵ No second chance is given. There is even less reason for giving respondent a second chance where the public health is at stake as in this case.

If a second chance were to be given to violators of the Department's regulatory programs even where the first violation was willful and serious, the remedial statutes would be rendered ineffective. It is a rare case where the violator has not ceased violating by the time the final order is issued. It is a rare case where the violator cannot produce some witnesses who regard his reputation as good irrespective of the violation. It is a rare case where the violator would not appear to be truly sorry for his misconduct and indicate that the violation will never again be committed. Accordingly, unless we were to adopt a second chance policy as to all of the Department's regulatory programs (which is not contemplated), there is no basis whatever for adopting it in this proceeding where the public health is at stake.

(b) District Court's First Utica Decision.

On appeal to the United States District Court, Judge Taylor upheld the Department's *per se* approach, finding "no abuse of discretion in the ensuing determinations that plaintiffs' evidence in impeachment or mitigation of the convictions was irrelevant or immaterial;" and agreeing with the Judicial Officer that "the evidence which plaintiffs presented on Fenster's present reputation and *Utica's* present plant conditions, is equally irrelevant to the application of the conviction-suspension provision of section 671" (511 F. Supp. at 665). The following excerpt sets forth Judge Tay-

⁵ *E.g.*, *In re Sterling Colo. Beef Co.*, 39 Agric. Dec. [184 (1980), appeal dismissed, No. 80-1293 (10th Cir. Aug. 11, 1980)]; *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1387-88 (1979), *aff'd per curiam*, 630 F.2d 370 (5th Cir. 1980), cert. denied, 450 U.S. 997 (1981)]; *In re Mountainside Butter & Egg Co.*, 38 Agric. Dec. 789, 800 (1978) (remand order), [final decision, 39 Agric. Dec. 862 (1980), *aff'd*, No. 80-3898 (D.N.J. June 23, 1982), *aff'd mem.*, 722 F.2d 733 (3d Cir. 1983), cert. denied, 104 S. Ct. 1417 (1984)]; *In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120 (1978); *In re Breckenridge Auction & Sales Co.*, 36 Agric. Dec. 1522, 1530 (1977); *In re DeJong Packing Co.*, 36 Agric. Dec. 1181, 1218-21 (1977), *aff'd*, Nos. 77-2722 and 77-2979 (9th Cir. Apr. 7, 1980) (2-1 decision); *In re Catanzaro*, 35 Agric. Dec. 26, 35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), printed in 36 Agric. Dec. 467 (1977); *In re Shatkin*, 34 Agric. Dec. 296, 313 (1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 135, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Miller*, 33 Agric. Dec. 53, 62, 81, *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

lor's views upholding the Department's *per se* approach (511 F. Supp. at 661-65):

In Arguments I and II of their brief, plaintiffs argue that the Secretary is authorized to withdraw inspection services under 21 U.S.C. § 671 only when the evidence "establishes," and a finding is made, that such withdrawal is necessary to effectuate the purposes of the Chapter; and further that the specific requisite finding would be that unwholesome meat would otherwise be sold by plaintiffs in this case. This argument devolves from plaintiffs strained reading of the opening language of § 671 that: "The Secretary may (*for such period, or indefinitely, as he deems necessary to effectuate the purposes of the Act*) refuse to provide, or withdraw, inspection services. . . ." This argument also constituted one facet of plaintiffs claim against the adequacy of the administrative complaint. It must fail because it is a twisted and improper construction of plain statutory language; because Congress clearly enacted § 671 on the basis of a *congressional* finding that participation of persons convicted of certain crimes in the program created an unwanted risk of the introduction of unwholesome meats into commerce, in violation of the above-quoted congressional purpose; and because the Judicial Officer did in fact make the finding required by section § 671 that "In view of the serious nature of the felony conviction in this case, which strikes at the heart of the integrity of the federal meat inspection program, an *indefinite withdrawal* of inspection service is appropriate to protect the public health, unless Mr. Fenster is disassociated from respondent." [p. 22, Judicial Officer's Decision.] That finding is supported by substantial evidence on the whole record, in accordance with the above-discussed law, and need not be based upon "established" facts as plaintiffs argue here. It is also a reasoned and non-arbitrary exercise of the Secretary's discretion on duration of a suspension. It articulates a rational connection between the facts found and the choice made, in accordance with *Bowman, supra*.

. . . As this court discussed, *supra*, concerning the adequacy of the complaint herein, Congress has specifically removed from this conviction-suspension section any necessity to find those facts relevant to those other sections pertaining to the wholesomeness of a participant's meat product. The Secretary need not re-establish the need for the

law itself in every case heard, with findings that a person suspendable under § 671 also currently sells unwholesome meats and is therefore suspendable under other sections. Such an interpretation would render § 671 a nullity. In enacting § 671 Congress has declared that, in order to effectuate the purposes declared in the above-quoted preamble, there are two types of criminal convictions which render a program participant unfit to continue in the industry; any felony, or two lesser crimes undermining the national interest in wholesome, unadulterated foods. Implicit is the congressional finding that the likelihood of such persons introducing unwholesome meats into commerce in the future is unacceptably strong, *regardless* of the quality of their meats at the time of the adjudication.

So the purpose of the hearing accorded the participant under § 671 is (1) to determine the actuality of a conviction and the status of the person convicted as a participant in the program or responsibly connected therewith; (2) to ascertain the elements of the crimes, if not felonies, and whether they are such as the statute describes as rendering a participant unfit; (3) to establish the duration of suspension necessary to effectuate the purposes of the act. On the issue of duration the elements of the felony committed are also relevant to a determination of what is necessary to effectuate the act. None of the issues to be heard or decided under § 671 make relevant plaintiffs' arguments, or evidence, that the hogs now being sold are wholesome. Congress has stated that this section shall have no effect on any other provisions for withdrawal of services based upon unwholesomeness.

The convictions on which this proceeding was initiated were four felony counts, each of which constituted an attempt to subvert the purposes of the act and facilitate the sale of at least arguably unwholesome food. Therefore, plaintiffs were plainly suspendable by *both* of the standards set out in § 671. The order of indefinite suspension, accordingly, cannot be said to be arbitrary, capricious, or an abuse of discretion. Indeed, the order has been carefully tailored to minimize its economic impact on Utica, either by the sale of Fenster's stock (over the duration of a year) or his withdrawal from active participation (after 90 days).

The Administrative Decisions also rely upon the testimony of Dr. Robert Gonter, the Director of the Evaluation and Enforcement Branch of the Compliance Division of the Food Safety and Quality Services of the Department of Agriculture. . . . His expert opinion was that inasmuch as the meat inspection service must rely considerably upon the integrity of plant management in effectuating the meat inspection program, he sought suspension in this case and it has become departmental policy to seek suspension in all cases of convictions involving bribery of federal meat inspection personnel. . . .

. . . Much of plaintiffs' evidence at the Administrative level constituted an attempt to mitigate or impeach the significance of Fenster's bribery convictions, or was related to the alleged current wholesomeness of plaintiffs' plant and the meats processed therein. To that extent it was irrelevant and immaterial, under § 671. . . .

. . . Plaintiffs' arguments that Fenster's bribes were futile in effectuating the sale of unwholesome meats are similarly self-defeating, and irrelevant as well. The evidence of probable economic loss to this community if Utica were to close is also, although unfortunate, irrelevant. That argument also reflects plaintiffs' continued adherence to the mentality which led to an offer of cash to a United States Veterinarian, in the first place. It is a refusal to acknowledge the declaration of our federal government, through Congress, that our interest in wholesome meats as a nation is superior to our economic interests, as individuals. All of plaintiffs' evidence taken together, including his character evidence, if considered relevant, is insufficient to render *insubstantial* the evidence on which the Secretary has based his rational decision that a suspension of Utica of indefinite duration is proper under § 671 if Fenster retains any responsible connection with the firm.

* * * * *

. . . It appears that, at the inception of these administrative proceedings, the ALJ advised the parties that, in accordance with an earlier Judicial Officer's Opinion, *In Re Norwich Beef Company*, 38 Ag.Dec. 380 (1970), he would hear plaintiffs' evidence of the circumstances surrounding

Fenster's felony convictions and his present reputation in the community. Accordingly, plaintiffs presented such evidence, which has been discussed *supra*. In his subsequent decision however, the ALJ noted plaintiffs' mitigation and character evidence and concluded that surrounding circumstances were not relevant, where the very nature of the felony conviction itself were so directly antithetical to the integrity of the program and the purposes of the act. [Appendix P. 127]. The Judicial Officer wrote, on this point:

In view of the type of felony involved in the present case, there is no need to consider any other circumstances in order to determine whether the conviction of this felony renders respondent unfit to receive inspection services.

It would similarly be inappropriate to consider whether it is likely that Mr. Fenster will again attempt to bribe a meat inspector. [Appendix p. 152].

The Judicial Officer thereafter likened plaintiffs' evidence and arguments to a request for a "second chance," and noted that:

It is a rare case where the violator cannot produce some witnesses who regard his reputation as good irrespective of the violation. It is a rare case where the violator would not appear to be truly sorry for his misconduct and indicate that the violation will never again be committed. (Appendix p. 154).

This court first notes that plaintiffs were not prejudiced by the ALJ's permitting them to introduce evidence and argue theories which were later determined to be irrelevant or incompetent. Full and fair opportunity to present their case was provided, and there is no claim of the exclusion of any evidence which plaintiffs felt was pertinent to their presentation on the record below. This court further finds no abuse of discretion in the ensuing determinations that plaintiffs' evidence in impeachment or mitigation of the convictions was irrelevant or immaterial; and indeed this court has made that same finding, in evaluating the substantiality of the evidence which supports the administrative conclusion, *supra*. Similarly, the evidence which

plaintiffs presented on Fenster's present reputation and Utica's present plant conditions, is equally irrelevant to the application of the conviction-suspension provision of § 671; and if it were considered relevant it would not render insubstantial that evidence which supports the decision made. That is the essence of the above-quoted rumination of the Judicial Officer on the weight to be accorded the testimony of character witnesses in such cases.

(c) Circuit Court's First Utica Decision.

Utica Packing Company and David Fenster appealed the adverse decision of the district court upholding the Department's *per se* approach to the United States Court of Appeals for the Sixth Circuit. The circuit court held that "the Judicial Officer erred in refusing to consider mitigating circumstances," and remanded the proceeding to the district court, for remand to the Judicial Officer. *Utica Packing Co. v. Bergland*, 705 F.2d 460 (6th Cir. 1982) (unpublished). After discussing the decisions by the Judicial Officer and the district court, the circuit court gave the following reasons for remanding the case (slip op. at 5):

On appeal, Fenster's principal argument is that the Judicial Officer erred in refusing to consider mitigating circumstances. We agree. Mitigating circumstances are not immaterial or irrelevant, and may be considered. Whether a particular conviction is itself sufficient to warrant withdrawal of inspection services depends upon the facts underlying the conviction. The more closely the conduct strikes to the policies of the Federal Meat Inspection Act, the more likely it alone will support a determination of unfitness regardless of the mitigating facts present. See *Wyszynski Provision Co., Inc. v. Sec. of Agriculture*, 538 F. Supp. 361, 364 (E.D. Pa. 1982).

Upon consideration of the briefs, the arguments of counsel, and the record, this Court is of the opinion that this action must be remanded to the district court with directions to afford the Judicial Officer an opportunity to consider the mitigating circumstances advanced by Fenster. This Court expresses no opinion on either the mitigating circumstances or the merits of the action.

In construing the circuit court's decision, we must, of course, consider the court's statements in the light of the factual situation and circumstances under consideration in *Utica*. "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be

taken in connection with the case in which these expressions are used." *Cohens v. Virginia*, 6 Wheat. 264, 399 (1821). See, also, *Osaka Shosen Kaisha Line v. United States*, 300 U.S. 98, 102-04 (1937); *Humphrey's Executor v. United States*, 295 U.S. 602, 626-27 (1935).

Specifically, in construing the circuit court's decision, we must keep in mind the fact that the decision relates to convictions of David Fenster for four felonies under 18 U.S.C. § 201(b) for corruptly giving money to the supervisor of the meat inspectors assigned to Utica's plant, and that the felonies involved prove that the payments were made to influence inspection at the plant. The circuit court quoted the opinion of the district court in Fenster's criminal case that "the evidence of a quid-pro-quo arrangement sufficient to establish a violation of § 201(b) is, in the opinion of this Court, overwhelming" (slip op. at 3). Moreover, the circuit court's views were expressed with respect to the review of a district court decision which upheld the Judicial Officer's refusal to consider mitigating circumstances where the felony convictions strike at the heart of the meat inspection program. In the light of that factual setting, there are three aspects of the circuit court's opinion to be interpreted.

First, did the circuit court *require* the Judicial Officer to consider the mitigating circumstances? The circuit court said that mitigating circumstances "may" be considered, and remanded the case to afford the Judicial Officer "an opportunity" to consider the mitigating circumstances (slip op. at 5). However, the court recognized that "Fenster's principal argument is that the Judicial Officer erred in *refusing* to consider mitigating circumstances," and the court said: "We agree" (slip op. at 5, emphasis added). Hence, here as in *Wyszynski* (see note 8, *supra*), the use of the words "may" and "opportunity" must be regarded as euphemistic, i.e., the court's opinion must be interpreted as *requiring* the Judicial Officer to consider the mitigating circumstances.

The second point (which really requires no interpretation, but is mentioned here only because of a misunderstanding of the Judicial Officer's Remand Decision by the Department's attorneys and the "Replacement Judicial Officer") is whether the circuit court directed the Judicial Officer to decide the case on remand one way or the other. The concluding sentence in the circuit court's opinion states: "This Court expresses no opinion on either the mitigating circumstances or the merits of the action" (slip op. at 5). No plainer statement could be made! The circuit court was not directing the Judicial Officer to decide the case for or against Utica and Fenster, but left the initial determination of that matter entirely to the Judicial Officer.

However, although the circuit court expressed "no opinion on either the mitigating circumstances or the merits of the action," one would have to be particularly obtuse not to discern that the circuit court was indicating that in the *Utica* case, it would be *extremely* likely that Fenster's felony convictions alone would support a determination of unfitness *regardless* of the mitigating facts present. That is, the circuit court said (slip op. at 5):

Whether a particular conviction is itself sufficient to warrant withdrawal of inspection services depends upon the facts underlying the conviction. The more closely the conduct strikes to the policies of the Federal Meat Inspection Act, the more likely it alone will support a determination of unfitness regardless of the mitigating facts present. *See Wyszynski Provision Co., Inc. v. Sec. of Agriculture*, 538 F. Supp. 361, 364 (E.D. Pa. 1982).

The circuit courts knew that the felonies involved in *Utica* did strike at the heart of the policies of the Federal Meat Inspection Act. In fact, there could be no felony that strikes closer to the heart of the policies of the Federal Meat Inspection Act than the felony of corruptly bribing the supervisory meat inspector assigned to a packing plant for the express purpose of influencing the inspection activities at the plant! Hence the circuit court's opinion strongly suggests (notwithstanding its concluding disclaimer) that in *Utica*, it is *extremely* likely that Fenster's felony convictions "alone will support a determination of unfitness regardless of the mitigating facts present." Accordingly, when I received the remand order in *Utica*, I was confident that if, after considering the mitigating circumstances, I again held that *Utica* was unfit to receive inspection, I would be affirmed on appeal.

The third point to be interpreted evoked perhaps the strongest intra-USDA disagreement in the 37 years that I have been involved with the Department's regulatory programs. The issue is whether, under the circuit court's opinion, as fairly construed in relation to the factual setting of the case, the court precluded the use of a *per se* approach by the Judicial Officer when he considered the mitigating circumstances on remand, and required the Judicial Officer to consider the mitigating circumstances from the viewpoint that *theoretically*, at least, in some future *hypothetical* case, some set of mitigating circumstances could be sufficiently strong so as to overcome the presumption of unfitness resulting from felony convictions of corruptly bribing the meat inspector assigned to the plant.

If, despite the circuit court's disagreement with the district court (which had affirmed the Judicial Officer's refusal to consider miti-

gating circumstances where the convictions strike at the heart of the meat inspection program), the Judicial Officer were still free on remand to adhere to his original view that where a person has been convicted of corruptly bribing the meat inspector, *no* mitigating circumstances could *ever* outweigh the bribery convictions, the Judicial Officer's decision on remand could have been very short, *viz.*:

Hypothetical Judicial Officer Decision on Remand

This case is here on remand from the United States Court of Appeals for the Sixth Circuit to consider respondent's mitigating circumstances. I have carefully considered all of the mitigating circumstances, but, as I indicated in my original decision in this case, there are *no possible* mitigating circumstances that can ever overcome the presumption of unfitness resulting from convictions of corruptly bribing the supervisory meat inspector assigned to the plant. Accordingly, I find (again) that respondent is unfit to receive inspection service (unless David Fenster disassociates himself from respondent) notwithstanding the mitigating circumstances presented here.

However, I believe that such an approach would have been censurable conduct. It is the duty of an administrative agency to comply with the court's views on remand, irrespective of how erroneous the agency believes those views to be. As stated in 2 Am. Jur. 2d *Administrative Law* § 767 (1962) (footnotes omitted):

§ 767. *Compliance with court decision.*

The administrative agency has an enforceable duty to comply with the order or judgment rendered on judicial review of its action unless it is void. The lower tribunal's exercise of jurisdiction after remand by the reviewing court is necessarily conditioned by the terms of the judgment on appeal, and the administrative agency is bound to act on and respect and follow the court's determination of questions of law within a reasonable time. However, this does not mean the agency may not indicate disagreement with the court's decision.

In *FPC v. Pacific Power & Light Co.*, 307 U.S. 156, 160 (1939), the Court stated:

[T]here is no more reason for assuming that a Commission will disregard the direction of a reviewing court than that a lower court will do so.

Similarly, in *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940), the Court stated:

On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. *Federal Power Comm'n v. Pacific Co.*, 307 U.S. 156. But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. Cf. *Ford Motor Co. v. Labor Board*, 305 U.S. 364.

Less the second sentence quoted immediately above be misunderstood, it is worth reviewing the factual situation to which the statement was addressed. In *Pottsville*, the Federal Communications Commission had denied Pottsville a permit to construct a broadcasting station on two grounds, one being that Pottsville was financially disqualified. On appeal, the circuit court held that the Commission's conclusion regarding Pottsville's lack of financial qualification was based on an erroneous understanding of Pennsylvania law, and remanded the case to the Commission "for reconsideration in accordance with the views expressed" (309 U.S. at 139).

By the time the proceeding got back to the Commission, the Commission had pending two rival applications for the same facilities, and determined that all three should be set down for argument "on a comparative basis" (see 309 U.S. at 140). The court of appeals then ordered the Commission to set aside its order directing a comparative hearing and to reconsider the application of Pottsville alone on the basis of the record as originally made and in accordance with the prior views of the court (see 309 U.S. at 140).

That latter action of the court of appeals was set aside on the ground that, although the court of appeals had authority to correct errors of law, and the Commission was bound to act upon such correction, the Commission could still carry out its statutory mandate by considering Pottsville's claim in comparison with the claims of the two rival companies. Nothing in *Pottsville* suggests that the Commission was free to ignore the court of appeals' correction of its error of law, i.e., the Commission was required in the comparative proceeding to follow the court of appeals' view as to Pottsville's financial qualification under Pennsylvania law.

The case of *Ford Motor Co. v. NLRB*, 305 U.S. 364 (1938), which was referred to by the Court in *Pottsville* in the quotation above, was one in which the Labor Board voluntarily requested to withdraw its petition filed in the court of appeals to enforce an admin-

istrative order (because of a recent holding in *Morgan v. United States*, 304 U.S. 1 (1938), that deciding officials must themselves consider the evidence before them and not merely rely on a decision prepared by subordinates). The court said in *Ford Motor Co.* (305 U.S. at 373-74):

It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points. . . . The "remand" does not encroach upon administrative functions. It means simply that the case is returned to the administrative body in order that it may take further action in accordance with the applicable law.

Accordingly, it is clear that when the court of appeals in *Utica* remanded the proceeding to the Judicial Officer, he was required to follow the court's view of the applicable law, no matter how erroneous he believed it to be.

If the Judicial Officer were free under the circuit court's remand order to consider the mitigating circumstances on the basis of his original view that *no* mitigating circumstances could *ever*, in any case, outweigh felony convictions of corruptly bribing the meat inspector, the outcome of the review of the mitigating circumstances would have been a foregone conclusion. No meaningful purpose would have been served by having the Judicial Officer review the mitigating circumstances if he were free to follow his original view. It was that very view that led the Judicial Officer to adopt the *per se* approach in the first place (which regards all mitigating evidence as irrelevant and immaterial in bribery cases), and that led the district court to affirm the *per se* approach in bribery cases on review.

However, when the circuit court disagreed with the Judicial Officer's original approach, and agreed with "Fenster's principal argument . . . that the Judicial Officer erred in refusing to consider mitigating circumstances," since "[m]itigating circumstances are not immaterial or irrelevant" (slip op. at 5), the circuit court must have meant for the review of the mitigating circumstances to be a meaningful review by the Judicial Officer. Specifically, the circuit court's opinion must be construed as holding (by implication) that *theoretically*, at least, in some future *hypothetical* case, some set of mitigating circumstances could be sufficiently strong so as to over-

come the presumption of unfitness resulting from felony convictions of corruptly bribing the meat inspector assigned to the plant.

As in *Wyszynski*, the circuit court in *Utica* gave no reasons why mitigating circumstances are relevant and material, and must be considered. But the circuit court could not have reversed the holding of the district court, which held that the Judicial Officer's use of the *per se* approach in the corrupt bribery case was reasonable, unless the circuit court believed that the Judicial Officer's use of the *per se* approach was arbitrary and capricious. And the circuit court could not have believed that the Judicial Officer's use of the *per se* approach was arbitrary and capricious in a corrupt bribery case unless, in the opinion of the circuit court, some set of mitigating circumstances in some hypothetical case could be sufficiently strong so as to overcome the presumption of unfitness resulting from felony convictions of corruptly bribing the meat inspector assigned to the plant.

In other words, the circuit court had no basis for reversing the views of the Judicial Officer and the district court as to the *per se* approach unless the circuit court disagreed with the Judicial Officer's view, affirmed by the district court, that felony convictions of corruptly bribing the meat inspector assigned to the plant so strike at the heart of the meat inspection program that mitigating circumstances are irrelevant and immaterial because no set of mitigating circumstances could ever overcome the presumption of unfitness resulting from such felony convictions. And if the circuit court disagreed with that view of the Judicial Officer, affirmed by the district court, the circuit court must have believed that *theoretically*, at least, in some future *hypothetical* case, some set of mitigating circumstances could be sufficiently strong so as to overcome the presumption of unfitness resulting from such felony convictions.

Having said all that, however, intellectual honesty compels me to admit that, theoretically, there would have been another possible basis for overturning the view of the Judicial Officer and the district court. The circuit court could have overturned the Judicial Officer's *per se* approach on the ground that the court lacked sufficient experience to determine whether the *per se* approach is valid or not, i.e., the court could have stated:

Hypothetical Circuit Court Decision

On appeal, Fenster's principal argument is that the Judicial Officer erred in refusing to consider mitigating circumstances. The Judicial Officer is of the view, affirmed by the district court, that in the case of convictions for cor-

ruptly bribing the meat inspector, the felonies so strike to the heart of the Federal Meat Inspection Program that mitigating circumstances are irrelevant and immaterial because it is impossible for any mitigating circumstances ever to outweigh convictions for corruptly bribing the meat inspector. The Judicial Officer and the district court may be right! But we do not have sufficient experience in this field to know for sure whether they are right or wrong. Therefore, we are not at this time prepared to approve of such a *per se* approach.¹¹ But neither are we prepared to say now that theoretically, at least, there is a set of mitigating circumstances that can overcome the presumption of unfitness resulting from convictions for corruptly bribing the meat inspector.

After we have had more experience with bribery cases under the Federal Meat Inspection Act, we may be prepared to approve a *per se* approach. But until we have had sufficient experience in this area, we will require the Judicial Officer to consider mitigating circumstances, even though we recognize that under his view (which may or may not be correct), he will, *in every case*, regard the mitigating circumstances as insufficient to overcome the presumption of unfitness resulting from convictions of corruptly bribing the meat inspector.

In some future case, we may decide as to the correctness of the Judicial Officer's view that mitigating circumstances are irrelevant and immaterial because it is impossible for any mitigating circumstances ever to outweigh convictions for corruptly bribing the inspector. But we do not have sufficient experience to decide that matter now, and until we do, the Judicial Officer must continue to consider the mitigating circumstances, even though the outcome of his consideration is a foregone conclusion.

¹¹ Cf. *United States v. McKesson & Robbins, Inc.*, 122 F. Supp. 333, 337 (1954), *rev'd*, 351 U.S. 305, 308-16 (1956), in which the district court stated:

This court is unwilling, at this stage of case law development of legislatively sanctioned resale price fixing, to hold illegal *per se* fair trade agreements because the producer is also a wholesaler in the absence of showing some injury, inchoate or consummate, to competition.

The Supreme Court, however, held the fair trade agreements to be illegal *per se*. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 308-16 (1956).

If the circuit court had meant that, the court certainly would have expressed those views, in its own language, of course. It is not a fair interpretation of the views expressed by the circuit court to read such doubt into the position of the circuit court. In fact, to contend that the circuit court reversed the Judicial Officer's *per se* approach because the circuit court was not sure whether the Judicial Officer's views were correct or not would, in effect, be accusing the circuit court of judicial illiteracy, i.e., it would be accusing the circuit court of a complete inability to express the view that it was uncertain as to the correctness of the Judicial Officer's view.

However, there is nothing in the circuit court's decision to indicate uncertainty as to the Judicial Officer's view relating to the *per se* approach. The circuit court's decision expresses quite clearly the court's opinion that the Judicial Officer's view, in this respect, is erroneous. Hence it is clear that the only basis the circuit court had for overturning the decision of the Judicial Officer, which was affirmed by the district court, was that the circuit court believed that *theoretically*, at least, in some future *hypothetical* case, some set of mitigating circumstances could be sufficiently strong so as to overcome the presumption of unfitness resulting from felony convictions of corruptly bribing the meat inspector assigned to the plant.

In other words, according to the circuit court, there are two classes of persons who have been convicted of corruptly bribing the meat inspector, (1) those bribers who are fit to receive meat inspection (because of mitigating circumstances), and (2) those bribers who are *not* fit to receive meat inspection. It was the duty of the Judicial Officer on remand to determine which class Utica and Fenster fit into.

To restate the matter under discussion in a different manner so as to focus the issue more sharply, the Judicial Officer's *per se* approach (reversed by the circuit court in *Utica*) is based on the following proposition:

USDA Proposition Supporting Per Se Approach

Where a person responsibly connected with a packing plant has been convicted under 18 U.S.C. § 201(b) of corruptly bribing the meat inspector assigned to the plant, there is *not* a set of mitigating circumstances that can overcome the presumption that the packing plant is (and will be for the indefinite future) unfit to receive meat inspection so long as the convicted individual is associated with the meat plant.

The USDA proposition is categorical and universal! It is either true in every factual situation, including the situation presenting the most mitigating circumstances that can *possibly* be presented in *any* case, or else it is false. "[A]ll declarative sentences [including propositions] are true or false. . . ." M. Beardsley, *Practical Logic* 4 (1950). False propositions are "propositions which assert either the non-existence of what does exist, or the existence of what does not exist." M. Cohen, *A Preface to Logic* 180 (1944). Since the USDA proposition is so definite and categorical, if there are any mitigating circumstances that can ever outweigh the presumption of unfitness resulting from felony convictions of corruptly bribing the meat inspector assigned to the plant, the proposition is false.

On the other hand, unless there is a set of mitigating circumstances that can overcome the presumption of unfitness resulting from felony convictions of corruptly bribing the meat inspector assigned to the plant, the USDA proposition is true! That fact is so obvious that it hardly needs to be stated. In other words, a reviewing court could not believe that the USDA proposition is false unless the reviewing court was of the view that, theoretically, at least, there is a set of mitigating circumstances that can overcome the presumption of unfitness resulting from felony convictions of corruptly bribing the meat inspector assigned to the plant.

As stated in M. Beardsley, *Practical Logic* 282-83, 287 (1944):

Any statement may be *affirmed* or *denied*. Take any statement—call it "S." To affirm "S" is simply to assert "S." To deny "S" is to affirm another statement, "Not-S," which has the following relationship to "S": (a) if "S" is true, then "Not-S" is false, and (b) if "S" is false, then "Not-S" is true. . . .

* * * * *

. . . Speaking of statements in general, then (including atomic and molecular statements), we shall say that to deny a statement is to assert the *contradictory* of the statement. . . .

* * * * *

. . . [E]very statement has one, and only one, contradictory.

There are three—and only three—*possible* views that a reviewing court could have with respect to the correctness of the USDA proposition, *viz.*:

1. Agree, i.e., believe that the proposition is true.
2. Disagree, i.e., believe that the proposition is false.
3. Not know whether the proposition is true or false.

As to the first of the three possible views, if a reviewing court agreed with the USDA proposition, it would have to affirm the Judicial Officer's *per se* approach (as was done in the district court's first decision in *Utica* (subsection 5(b), *supra*); and see the district court's first decision in *Toscony* (subsection 4, *supra*)). That is, if the reviewing court agreed with the Judicial Officer that there are *no possible* mitigating circumstances that can *ever* overcome the presumption of unfitness resulting from felony convictions of corruptly bribing the meat inspector assigned to the plant, the reviewing court would have to hold that the *per se* approach is reasonable and lawful, and that mitigating circumstances are never relevant or material where there have been felony convictions of corruptly bribing the meat inspector assigned to the plant.

A reviewing court holding that the USDA proposition is true would not, of course, be setting forth that proposition as its own proposition. It would merely be holding that the administrative officials charged with protecting the public health under the Federal Meat Inspection Act could reasonably and rationally reach the conclusion set forth in the proposition.

The reviewing court would not be approaching the issue from the viewpoint of a Professor of Logic, who would expect verification of the proposition with mathematical certainty,¹² but, rather, from the viewpoint of a judge reviewing an administrative determination, which should be upheld if it has a reasonable and rational basis, is not arbitrary and capricious, and is within statutory limits.

As to the second and third of the three possible views, if the reviewing court either disagreed with the USDA proposition or did not know whether it is true or false, the court would, of course, have to reverse the Judicial Officer's use of the *per se* approach and require the Judicial Officer to consider the mitigating evidence. (These are the *only two possible grounds* for refusing to affirm the

¹² The formal principles of Logic are not directly applicable to the USDA proposition since it is an *opinion* not subject to verification with mathematical certainty. But the principles of Logic set forth above are useful tools here since they lead to the same result reached by applying common sense.

per se approach as to felony convictions of corruptly bribing the meat inspector assigned to the plant!)

As explained above, there is nothing in the circuit court's decision indicating that it did not know whether the proposition is true or false, and there is no basis for reading into the circuit court's decision any such doubt. Accordingly, the only rational interpretation of the circuit court's first decision, which is in accord with the plain language of the decision, is that the circuit court disagreed with the proposition, i.e., the circuit court believed the proposition to be false.

Since the circuit court's opinion must be construed as disagreeing with the USDA proposition, i.e., expressing the view that the proposition is false, the circuit court is, by necessary implication, asserting the *contradictory* of the proposition (see Beardsley, *supra*, at 282-83, 287). The *contradictory* of the USDA proposition is identical to the USDA proposition, except that the word "not" is removed, *viz.*:

Proposition Necessarily Implied By Circuit Court

Where a person responsibly connected with a packing plant has been convicted under 18 U.S.C. § 201(b) of corruptly bribing the meat inspector assigned to the plant, there is a set of mitigating circumstances that can overcome the presumption that the packing plant is (and will be for the indefinite future) unfit to receive meat inspection so long as the convicted individual is associated with the meat plant.

There is no way of avoiding this implication! That is, the reviewing court could not believe that the USDA proposition is false unless the reviewing court was of the view that there is a set of mitigating circumstances that can overcome the presumption of unfitness resulting from the bribery conviction.

In other words, leaving aside uncertainty as to whether the USDA proposition is true or false (as we must since the court's opinion cannot fairly be interpreted as expressing doubt or uncertainty), either (i) there is not a set of mitigating circumstances that can overcome the presumption of unfitness, or (ii) there is a set of mitigating circumstances that can overcome the presumption of unfitness. The circuit court's reversal of the Judicial Officer's *per se* approach necessarily implies that the circuit court believes that there is a set of mitigating circumstances that can overcome the presumption of unfitness.

It was the duty of the Judicial Officer on remand to accept the circuit court's (implied) proposition. Specifically, in exercising his

discretion on remand, the Judicial Officer was not permitted to believe (as he previously had) that where there have been felony convictions of corruptly bribing the meat inspector, *no* set of mitigating circumstances can *ever* overcome the presumption of unfitness resulting from the bribery convictions. He was required to take the circuit court's (necessarily implied) view that enough mitigating circumstances can overcome that presumption of unfitness.

In short, the Judicial Officer was required to determine whether Utica and Fenster fit into the class of bribers who are, because of mitigating circumstances, still fit to receive meat inspection notwithstanding the bribery convictions, or whether they fit into the class of bribers who do not have enough mitigating circumstances and, therefore, are unfit to receive inspection.

Analytically, we would have to recognize that even if the circuit court did not disagree with the USDA proposition, or did not know whether it was true or false, the court still could have reversed for two other reasons.

First, theoretically, at least, the court might not have given the matter enough thought to fully understand the issues or to recognize the necessary implication of its decision.

Second, since the circuit court's decision was not to be published, theoretically, at least, the court might have taken a "pragmatic" approach, i.e., without determining a reasonable basis for reversing the *per se* approach, the court might have thought that it could placate Utica and Fenster (and avoid possible Supreme Court review) while having the same result reached after a remand. That is, the circuit court would expect the Judicial Officer to hold Utica unfit on remand, since the circuit court stated that the "more closely the conduct strikes to the policies of the Federal Meat Inspection Act, the more likely it alone will support a determination of unfitness regardless of the mitigating facts present," and the circuit court would affirm the Judicial Officer's remand determination if Utica bothered to appeal again (which would not present an issue of any interest to the Supreme Court).

However, it would be highly inappropriate to attribute to the circuit court either a lack of thought and analysis or a conscious decision to take such a "pragmatic" approach.

Accordingly, since the only legitimate grounds for remand were that the court believed the USDA proposition to be false, or did not know whether it is true or false, and the circuit court's opinion cannot be construed as indicating doubt, there is no alternative but to hold that the circuit court's decision necessarily expresses the view, by implication, that the USDA proposition is false. And a holding that the USDA proposition is false necessarily asserts its

contradictory, i.e., according to the circuit court, there is a set of mitigating circumstances that can overcome the presumption of unfitness resulting from convictions of corruptly bribing the the meat inspector assigned to the plant.

(d) Judicial Officer's Utica Decision on Remand.

On remand, "with great reluctance and misgiving" (slip op. at 29), the Judicial Officer dismissed the complaint, on the basis of his interpretation (see subsection 5(c), immediately above) of the circuit court's remand decision. *In re Utica Packing Co.*, 43 Agric. Dec. ____ (Nov. 18, 1982).¹³ It is important to note that the decision on remand has two aspects, *viz.*, (1) the Judicial Officer's *interpretation* of the circuit court's decision (see subsection 5(c), immediately above), and (2) the *application* of that interpretation to the particular facts involved in *Utica*. In dismissing the complaint, the Judicial Officer stated (slip op. at 10-29):

In addition to considering the effect of Fenster's bribery attempt at respondent's plant, we must consider the cancerous nature of bribery. Unless stopped, bribery can spread until it is the routine course of business in a large area. See *In re National Meat Packers, Inc.*, 38 Agric. Dec. 169, 172-73 (1978), in which it is explained:

In southern California between 1974 and 1976, 17 meatpacking houses and 35 employees of meatpackers were indicted and convicted of either bribery or illegally giving gratuity to meat graders. The involved plants constituted "a major part of the slaughtering companies or those using Federal grading service" in southern California (Tr. 19).

Sixteen Federal meat graders were indicted and convicted of receiving money.

Since meat inspectors cannot observe every activity at a plant by every employee which affects the wholesomeness of the product, the inspection service must be able to depend on the reliability and integrity of the plant's management to be assured that the health and welfare of con-

¹³ Although all decisions by the Judicial Officer are printed in Agriculture Decisions for the month in which they are issued, the decision was (erroneously, I believe) made not to publish the Judicial Officer's Decision and Order on Remand in this case. (Presumably, the Department planned to print the decision in the March 1984 volume of Agriculture Decisions, which will contain the ruling on reconsideration. The Department is about 3 years behind in printing Agriculture Decisions.)

sumers will be protected. *See In re Norwich Beef Co.*, 38 Agric. Dec. 380, 394-96 (1979), *aff'd*, No. H 79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982).

Also, meat inspectors are relatively low paid Federal employees. Packers have, at times, paid weekly (tax free) bribes to meat inspectors or graders equal to or more than their Federal take-home pay (*see In re National Meat Packers, Inc.*, 38 Agric. Dec. 169, 171-72 (1978)). Accordingly, if we are to be assured of having wholesome meat and meat food products from a particular plant, we must know without question that the plant's management will not attempt to bribe any inspector at the plant.

It is the view of the Administrator of the Department's meat inspection program and the Judicial Officer that every person convicted under 18 U.S.C. § 201(b) of corruptly bribing a meat inspector, with the necessary proof of criminal knowledge and purpose, is unfit to receive Federal meat inspection, irrespective of any mitigating circumstances. That conduct alone so strikes at the heart of the meat inspection program as to prove conclusively, without regard to any mitigating circumstances, that the convicted felon is unfit to receive Federal meat inspection.

Accordingly, in the present case, the Judicial Officer held that respondent was unfit to receive Federal meat inspection because of David Fenster's bribery convictions, irrespective of any mitigating circumstances. The Judicial Officer's decision made it clear that mitigating circumstances are to be considered in the case of felonies not striking at the heart of the meat inspection program. Specifically, the Judicial Officer held (*In re Utica Packing Co.*, 39 Agric. Dec. 590, 603 (1980)):

* * * * *

In a thoughtful and well-reasoned decision, the District Court affirmed the Judicial Officer's original decision in this proceeding. *Utica Packing Co. v. Bergland*, 511 F. Supp. 655 (E.D. Mich. 1981).

I believe that the original administrative decision in this case is correct, notwithstanding the reversal by the Court of Appeals. The decision by the Court of Appeals in this

case will assure the distribution of unwholesome or adulterated meat in some instances. That is, under the Sixth Circuit's opinion, if there are enough mitigating circumstances, a felon convicted under 18 U.S.C. § 201(b) of corruptly bribing a Federal meat inspector must, nonetheless, be determined to be fit to continue to receive Federal meat inspection. Since the judicial system has not had outstanding success in predicting which criminals will repeat their criminal conduct, we are not likely to have any better batting average in predicting which felons convicted of bribing a meat inspector will not repeat the unlawful conduct, or otherwise attempt to subvert the meat inspection program.

It is true that the Court of Appeals' decision indicates that in the case of a bribery conviction, it is "likely" it will support a determination of unfitness regardless of the mitigating facts present. Specifically, the Court states (slip op. at 5):

The more closely the conduct strikes to the policies of the Federal Meat Inspection Act, the more likely it alone will support a determination of unfitness regardless of the mitigating facts present.

Although that suggests that the great majority of persons convicted of bribery under 18 U.S.C. § 201(b) will be found unfit to receive Federal meat inspection regardless of the mitigating facts present, it also suggests that some mitigating facts would outweigh a bribery conviction. Otherwise, the Court would not have remanded the present case to consider the mitigating circumstances, notwithstanding Fenster's convictions for bribing the supervisory meat inspector.

In other words, the Court's statement quoted above was made in this case where the Judicial Officer had held that Fenster's conduct so strikes to the heart of the policies of the Federal Meat Inspection Act that no possible mitigating circumstances could outweigh the felony convictions in determining respondent's fitness to receive Federal inspection. The Court of Appeals did not agree.

The Court's decision must, of course, be followed here—but not in cases in which an appeal does not lie to the Sixth Circuit.

For the reasons set forth above, the decision of the Court of Appeals in this case will not be followed in any case in which an appeal does not lie to the Sixth Circuit. In all cases in which an appeal does not lie to the Sixth Circuit, anyone who is convicted under 18 U.S.C. § 201(b) of the felony of bribing a Federal meat inspector will automatically be found unfit to receive Federal inspection, and Federal inspection will be withdrawn indefinitely from the plant (unless it is appropriate, as in the present case, to continue inspection if the convicted felon is completely disassociated from the plant).

However, since other reviewing courts might agree with the Sixth Circuit's decision in the present case, the Administrative Law Judges should in every case receive evidence as to mitigating circumstances and indicate their opinion as to such circumstances.

Respondent relies on a number of so-called mitigating circumstances. David Fenster testified that prior to offering the bribes, he felt that the inspectors were enforcing the rules unfairly, arbitrarily and in a discriminatory manner at respondent's plant. He was receiving offers to buy his plant, and he believed that the Federal inspectors might be part of a conspiracy to induce him to sell; that they might be stopping his production line unnecessarily so as to earn overtime pay; and that some of the inspectors were harassing him because of a personal dislike for him.

There is much evidence in the record to demonstrate the reasonableness of Mr. Fenster's beliefs as to the inspectors. His production line was stopped by the inspectors for an average of two or more hours a day during the period preceding the bribes. This not only caused respondent to have to pay over 100 employees for their lost time, but, also, frequently prevented the plant from completing the killing of the hogs that arrived by truck each day.

On many days during the summer of 1976 (preceding the bribes in November and December 1976), more than 15 or 20 hogs died on the trucks because the line had been stopped by the inspectors (Tr. 277-280). Some Federal inspectors felt that inspection at respondent's plant was more strict than at its competitors' plants, and David Fenster's son observed that at a competitor's plant the line

was not stopped for conditions which he felt were far worse than at respondent's plant.²

² Weighty evidence proves that much corrective action by the Inspectors at Utica was justified. A Compliance Review Staff gave respondent's plant the lowest possible rating in September 1976. If conditions were worse at competitor's plants, inspection there might have been too lax. Also, the record suggests that other plants have a "kick-out" rail which allows animals to be set aside without stopping the line. The addition of a "kick-out" rail should be explored by respondent.

Respondent contends that the ring leader of the inspectors harassing the plant was John Stadler, a close friend of Dr. Reed, who received the bribes in this case. John Stadler "hated the black people" at respondent's plant (Tr. 1026); he "had no use for blacks" (Tr. 1053). He also "hated Yugoslavians" (Tr. 1053), who comprise a large portion of respondent's work force. He referred to David Fenster's partner as "a stupid Yugoslavian" (Tr. 1025-26).

David Fenster is a Jew, and inspector Stadler made such obscene and derogatory comments about Jews that decency precludes me from quoting his comments or even giving the record citation (counsel for both parties are aware of the transcript reference). In particular, Inspector Stadler had a "personal dislike or hatred toward David Fenster" (Tr. 1050-51).

Inspector Stadler, Dr. Reed (who received the bribes) and another inspector "would go to a bar after work and think of ways to set up Mr. Fenster, or cause problems to him the following day at the plant," to "make it rough on the plant" (Tr. 1055).

These circumstances lend support to the view that David Fenster at least had a reasonable basis for believing that he was being harassed by some of the inspectors and subjected to discriminatory treatment.

Respondent complained frequently to Dr. Reed's supervisors, but conditions did not change at the plant, and Fenster felt that he was being given the "run around" by Dr. Reed's supervisors.

Notwithstanding these circumstances, they are no excuse for bribery. An individual who feels that he is being mistreated by Federal inspectors (or who actually is suffering mistreatment from inspectors) cannot take the matter into his own hands by offering bribes. He must

pursue the administrative avenues which are available. If his initial efforts are unsuccessful, he must continue bringing his problem to the attention of higher officials until he reaches the top. If all that fails, bribery is still inexcusable.

If an individual having difficulty because of Federal inspectors (real or imaginary) could solve his problems by bribing the inspectors, it would lead to the public interest being subverted, not only at that individual's plant, but at other plants, where the practice would soon spread.

Accordingly, I would give no weight to this circumstance in determining respondent's fitness to receive Federal meat inspection, in the absence of the Sixth Circuit's opinion in this case.

Respondent also contends that Fenster's conduct was aberrant behavior resulting from particularly stressful conditions and exacerbation of old psychic injuries while a victim of the Nazi Holocaust. David Fenster witnessed the killing of his father by the Nazis, and, together with his mother, sister, and brother, he escaped from a train en route to a gas chamber. He never saw his family again. He was recaptured and taken to a concentration camp before being liberated in 1945.

David Fenster undoubtedly was under great stress and emotional strain at the time of the bribery in 1976. In 1975 he lost the sight of his right eye, after several operations. For months after the operation, he had headaches and nerve problems, requiring him to take sleeping pills, tranquilizers, and other drugs. Then his left eye started to go bad in 1976. He consulted numerous doctors, receiving conflicting advice as to the desirability of surgery, which subjected him to great emotional stress. He had additional problems because his partner drank heavily. His problems with meat inspectors, referred to above, further contributed to his stress.

* * * * *

Although David Fenster deserves much sympathy for the many problems referred to above, they do not excuse bribery of a Federal meat inspector, and do not cause me to change my views with respect to respondent's unfitness

to receive meat inspection so long as David Fenster is associated with respondent.

* * * * *

Accordingly, these mitigating circumstances would have no weight with me in determining respondent's fitness to receive Federal meat inspection, in the absence of the Sixth Circuit's opinion in this case.

Respondent also relies on the prior good record of respondent and David Fenster, and his present good reputation, despite the conviction. Here again, I give more weight to the facts involved in the felony convictions than to opinions as to respondent and Fenster. I have reviewed too many files where highly respected persons testified as to a person's excellent character and reputation, despite unchallenged evidence in the file proving that he engaged in serious, fraudulent conduct, to attach any significant weight to such testimony.

Accordingly, I would give no weight to these circumstances in determining respondent's fitness to receive Federal meat inspection, in the absence of the Sixth Circuit's opinion in this case.

Respondent also relies on the fact that it is not now having any problems with the meat inspection program. In fact, on October 15, 1979, the U.S. Veterinarian who serves as Area Supervisor filed a report advising the Director of Meat and Poultry Inspection that the respondent plant had, since December of 1978, established "a clean meat program" and "now is producing very clean hogs and plant management can be proud of their product."

Although this is the most substantial of the mitigating circumstances relied on by respondent, it would not begin to tip the scales in respondent's favor, in the absence of the Sixth Circuit's opinion in this case. The argument that respondent is not now violating the Act is made in almost every disciplinary case that comes before the Judicial Officer, and is almost always true. Only a foolhardy respondent would continue to violate a regulatory statute, after a complaint is filed, pending the outcome of the litigation. Exemplary conduct during the course of litigation is not as

revealing or weighty as conduct occurring before the spotlight of litigation is turned on a respondent.

* * * * *

Accordingly, in the absence of the Sixth Circuit's opinion in this case, I would give no weight to respondent's conduct after the complaint was filed in this case.

Respondent also relies on the length of time since Fenster's illegal conduct. It is indeed unfortunate that so much time has elapsed. The bribery occurred at the end of 1976. The indictment was returned and filed on November 15, 1977. The criminal proceeding was concluded August 22, 1978. The criminal conviction formed the basis for the present administrative proceeding, which was initiated on October 18, 1978. The Administrative Law Judge decided the case February 11, 1980, and the Judicial Officer decided the case June 25, 1980. The remand order was received in September 1982. Although this six year period since the violation is most unfortunate from the standpoint of the public interest in assuring a wholesome meat supply, it does not afford the basis for finding that respondent is fit to receive meat inspection with David Fenster still associated with respondent.

Accordingly, I would give no weight to this circumstance, in the absence of the Sixth Circuit Court's opinion in this case.

Respondent contends that withdrawal of meat inspection would adversely affect its employees and the community. But under the terms of the order in this case, there is no need for inspection service to be withdrawn if David Fenster becomes disassociated with respondent. Although Mr. Fenster feels that he is indispensable to the successful operation of the plant, it seems likely that someone could be found to fill his role. In any event, however, it has consistently been held by the Judicial Officer that the public interest must prevail, and that an appropriate order must be issued, irrespective of any local damage to respondent, his employees or the community. [Footnote omitted.]

Accordingly, I would give no weight to this circumstance, in the absence of the Sixth Circuit's opinion in this case.

Two other circumstances that I regard as totally irrelevant, but which should be mentioned if we are to look at all the facts underlying the conviction, should be mentioned.

First, although any conviction under 18 U.S.C. § 201(b) of corruptly bribing a meat inspector strikes so closely to the heart of the Federal meat inspection program that it proves conclusively to me that the convicted felon is unfit to receive meat inspection, nonetheless, there are, of course, degrees of bribery. In this case, the bribery was not as flagrant as it could have been. That is, although Mr. Fenster did not want the line stopped as often, there is some basis for his belief that the line was being stopped unnecessarily. Also, during the bribery conversations, Mr. Fenster made it clear to Dr. Reed that he wanted a clean plant, and that he wanted Dr. Reed's help in achieving that objective. As to tuberculosis hogs, although Mr. Fenster suggested several times during the bribery conversations that borderline hogs should be passed, he also stated on many occasions during the same bribery conversations that he had no right to tell Dr. Reed what to do as to tuberculosis hogs, and that Dr. Reed should use his own judgment as to them.

Second, the testimony in this proceeding indicates that the bribes would not have been given if Dr. Reed had not misunderstood a comment by David Fenster, and later hinted strongly to Fenster that he wanted money from Fenster. Fenster testified that in September 1976 when Dr. Reed was in Fenster's office, Fenster asked him "What do you want?" (Tr. 760). By this, Fenster meant, "What am I doing wrong? What do you want from me? What do you want me to do?" (Tr. 760).

Dr. Reed took Fenster's statement as suggesting a bribe, went to the FBI, got wired-up with a tape recorder, and then went back to Fenster's office on November 24, 1976. Dr. Reed initiated the discussion by saying, "Well, you told me, you asked me what I want?" (Tr. 772). Dr. Reed then said, "Well you know"—"You know what" (Tr. 772). Fenster naturally took this as an invitation for a bribe, and immediately said, "What do you want, money? Well, I'll

give you a hundred," "What do you want, you want \$200?" (Tr. 772).

* * * * *

Respondent concedes that Dr. Reed's conduct was not sufficient entrapment to constitute a defense to a criminal proceeding, but, nonetheless, if the facts are as sworn by David Fenster at the administrative proceeding in this case, this would be a mitigating circumstance to be considered under the Sixth Circuit's remand order (although I would give such circumstance no weight in the absence of the Sixth Circuit's order).

Considering all of the mitigating circumstances in this case, I strongly believe that respondent is unfit to receive Federal inspection so long as David Fenster is associated with the plant. However, my belief is based on the strongly held view that *any* person who is convicted under 18 U.S.C. § 201(b) of corruptly bribing a Federal meat inspector is unfit to receive Federal inspection regardless of *any* mitigating circumstances.

The Administrative Law Judge who saw and heard the witnesses testify in this case stated (Initial Decision 8-9) that the evidence establishes that:

1. Mr. Fenster's reputation in his community, despite his conviction by the United States District Court, is excellent;

2. His bribing of the Veterinarian-Inspector was apparently aberrant behavior for him resulting from: a) serious health problems, b) exacerbation of old psychic injuries while a victim of the Nazi Holocaust, and c) misapprehensions concerning the motivation of various inspectors who had undertaken stricter enforcement of Federal Meat Inspection Act requirements; and,

3. The problems which led to his aberrant behavior have largely disappeared leading the U. S. Veterinarian who serves as Area Supervisor to file an official report, on October 15, 1979, advising the Director of Meat and Poultry Inspection that the respondent plant had, since December of 1978, established "a clean meat program" and

"now is producing very clean hogs and plant management can be proud of their product."

Based on those facts, the Administrative Law Judge made "the consequent finding that recurrence is unlikely because of the general excellence of Mr. Fenster's character and reputation and the elimination of the conditions and motivations which led to the commission of the felony" (Initial Decision 9).

Notwithstanding all of the foregoing views, the Judicial Officer dismissed the complaint in *Utica* because of his view that *if* there are two classes of criminals who have been convicted of bribing meat inspectors, i.e., (i) those who are fit to receive inspection (because of mitigating circumstances), and (ii) those who are not fit to receive inspection, *Utica* and Fenster belong in the first group. His view that for the purposes of the *Utica* case he must assume that there are two such classes was based on his *interpretation* of the circuit court's remand order, discussed in subsection 5(c), above. His view that *Utica* and Fenster belong in the first class was based on his personal *application* of that interpretation. Specifically, the Judicial Officer stated (slip op. at 28-29):

If mitigating circumstances must be considered, I cannot reasonably imagine any stronger mitigating circumstances than appear here. If any felon convicted under 18 U.S.C. § 201(b) of bribing a meat inspector is fit to receive Federal meat inspection, then David Fenster is fit to receive Federal meat inspection (or, more accurately, respondent is fit to receive Federal meat inspection even with David Fenster associated with the plant).

Furthermore, David Fenster has already been precluded from working at respondent's plant for 9 or 10 months, since a stay order was not issued following the District Court's decision in this case. This is not a significant factor to me since I believe that *no* period of time away from a meat plant could make a person convicted under 18 U.S.C. § 201(b) of bribing a meat inspector fit to receive Federal inspection (just as no passage of time could make a Federal inspector who accepted a bribe fit to be reemployed as a Federal inspector). But this is a circumstance that is as relevant as the other circumstances referred to above.

For the reasons set forth above, I am with great reluctance and misgiving dismissing the complaint in this case.

I would not want to eat meat from any plant managed by a person who has been convicted under 18 U.S.C. § 201(b) of corruptly bribing a meat inspector. I deeply regret that I feel compelled by the Sixth Circuit's remand order to cause other persons to have to do so.

(e) "Replacement" Judicial Officer's Utica Decision on Reconsideration.

Following the decision of the Judicial Officer on remand, the Department filed a Petition for Reconsideration, and at the same time the Secretary revoked the Judicial Officer's authority to perform any further regulatory function in the case and appointed a replacement to consider the Petition for Reconsideration. As stated in *Utica Packing Co. v. Block*, 781 F.2d 71, 74 (1986):

As the brief of the Secretary in this court states, the USDA "violently disagreed" with the latest decision of the Judicial Officer and had "little hope of reconsideration." Instead of petitioning for reconsideration immediately, these officials obtained the Secretary's agreement to revoke Campbell's authority to perform any further "regulatory function" in the Utica case and to "vest such authority in Deputy Assistant Secretary John J. Franke, Jr." Appellee's Brief at 8-9. Mr. Franke is not a lawyer and had never performed adjudicatory, regulatory or legal work. Richard Davis, an attorney in the Office of General Counsel of USDA, was assigned to assist Franke. Davis had no previous contact with the Utica case, but his immediate supervisor participated in the removal of Campbell and appointment of Franke, and also supervised the division responsible for the prosecution of Utica.

The Department has had only two Judicial Officers since the position was created in 1942 (the first Judicial Officer served from 1942 to 1972, and the present Judicial Officer was appointed in January 1971). There had never previously been an order removing the Judicial Officer from a case (except where the Judicial Officer disqualified himself in a case or two because of contact with the case before being appointed Judicial Officer).

The "replacement" Judicial Officer held that the Judicial Officer misinterpreted the circuit court's remand order, and concluded that respondent is unfit to receive inspection while David Fenster is associated with it. He held that the circuit court "did not hold, even by implication, that there must be some set of mitigating circumstances which will outweigh a conviction of any felony" (slip

op. at 2-3). The "replacement" Judicial Officer stated (slip op. at 2-4):

In his discussion of the import of the Court of Appeals Order, the Judicial Officer stated "under the Sixth Circuit's opinion, if there are enough mitigating circumstances, a felon convicted under 18 U.S.C. § 201(b) of corruptly bribing a Federal meat inspector must, nonetheless, be determined to be fit to continue to receive Federal meat inspection." He states further

Although [the Court of Appeals Order] suggests that the great majority of persons convicted of bribery under 18 U.S.C. § 201(b) will be found unfit to receive Federal meat inspection regardless of the mitigating facts present, it also suggests that some mitigating facts would outweigh a bribery conviction. Otherwise, the Court would not have remanded the present case to consider the mitigating circumstances, notwithstanding Fenster's convictions for bribing the supervisory meat inspector.

The Court of Appeals clearly held that mitigating circumstances are not immaterial or irrelevant and that the Judicial Officer erred in refusing to consider the mitigating evidence presented in this case. But it did not hold, even by implication, that there must be some set of mitigating circumstances which will outweigh a conviction of any felony. Indeed, the Court said "The more closely the conduct strikes to the policies of the Federal Meat Inspection Act, the more likely it alone will support a determination of unfitness regardless of the mitigating facts present." All of this without once adverting to the strength of the evidence of mitigating circumstances. Finally, the Court unequivocally stated "This court expresses no opinion on either the mitigating circumstances or the merits of the action." Yet, despite the clear holdings and disclaimer quoted above, the Judicial Officer concluded that the Court's order implied that "some mitigating facts would outweigh a bribery conviction." I disagree. Indeed, for the Court to say, or imply, what the Judicial Officer inferred would have constituted the Court substituting its judgment for that of this Department. It is well established that a court may not do that. *Citizens to Preserve*

Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); *Coastal Tank Lines, Inc. v. ICC*, 690 F.2d 537, 543 (6th Cir. 1982). I am unwilling to infer that the court intended to so intrude upon the Department's discretionary authority.¹⁴

I therefore believe that the Judicial Officer should have decided the case as he clearly indicated he thought it should be decided in his Decision and Order on Remand at page 27: "Considering all of the mitigating circumstances in this case, I strongly believe that respondent is unfit to receive Federal inspection so long as David Fenster is associated with the plant." He had at that point done all that the Court of Appeals order required him to do: considered the mitigating circumstances, considered how closely David Fenster's criminal conduct strikes to the policies of the Federal Meat Inspection Act, weighed the two against each other, and concluded that Utica is unfit to receive federal meat inspection while David Fenster is associated with it.

I further think that the order of the Court of Appeals, as I understand it, is correct and that in all cases under section 401 of the Federal Meat Inspection Act (21 U.S.C. § 671), if mitigating evidence is proffered it must be received and must be considered by the adjudicating officials who decide the case.

After consideration of the entire record of this proceeding, I agree, except as indicated in the three preceding paragraphs, with the Judicial Officer's original decision

¹⁴ If the circuit court did not imply what the Judicial Officer inferred, why did it reverse the Judicial Officer's use of the *per se* approach, which was affirmed by the district court? (See subsection 5(c), *supra*.) Furthermore, the cases cited by the "replacement" Judicial Officer merely state that a court is not empowered to substitute its judgment for that of the agency. The circuit court did not violate that principle by setting forth the standard to be applied by the agency in exercising its judgment. The problem with the circuit court's decision is not that it substituted its judgment for that of the agency, but that it set forth (by necessary implication) an erroneous standard to be applied by the agency in exercising its discretion, i.e., the circuit court precluded the agency from considering the mitigating circumstances in the light of its *per se* view that no mitigating circumstances could ever overcome the presumption of unfitness resulting from convictions of corruptly bribing the meat inspector assigned to the plant, and required the agency to consider the mitigating circumstances from the viewpoint that, theoretically, at least, there is a set of mitigating circumstances that can overcome that presumption (see subsection 5(c), *supra*).

and with his decision on remand.¹⁵ Specifically, I agree that the felony involved here strikes at the very heart of the Federal Meat Inspection Act program and I agree that, despite the mitigating circumstances presented by respondent, respondent is unfit to receive federal meat inspection so long as David Fenster is associated with the plant. I therefore agree generally with the order originally issued by the Judicial Officer on June 25, 1980. I think, however, considering all the circumstances of this case, that a longer period of time should be allowed for David Fenster to dissociate himself from Utica.

Although the appointment of a "replacement" Judicial Officer to consider the Petition for Reconsideration was held to violate Utica's right to a "fair trial before a fair tribunal" (*Utica Packing Co. v. Block*, 781 F.2d 71, 77-78 (1986)), thereby rendering the "replacement" Judicial Officer's decision on reconsideration nugatory, in order to avoid any possible doubt as to the matter, I am expressly overruling that portion of his decision which states that the order of the circuit court is correct, and that in all cases under the Federal Meat Inspection Act, mitigating evidence "must be considered by the adjudicating officials who decide the case" (slip op. at 4).

As stated in my Decision and Order on Remand (see subsection 5(d), *supra*), the circuit court's ruling will be followed only in cases in which an appeal lies to the Sixth Circuit (slip op. at 15). However, until the matter is definitively decided, after deciding the case on the basis of the *per se* rule set forth above, the ALJ's should, and the Judicial Officer will, by way of *dicta*, indicate what weight is attached to the mitigating circumstances, and whether the respondent would be regarded as unfit if the mitigating circumstances were regarded as relevant.

This policy of "nonacquiescence" with respect to a circuit court's decision deemed erroneous is followed by many, if not all, administrative agencies where they believe that an adverse court of ap-

¹⁵ This sentence could be interpreted as agreeing with the Judicial Officer's view that if we are compelled by the circuit court's remand decision to consider the mitigating circumstances from the viewpoint that there is theoretically, at least, a set of mitigating circumstances that can overcome the presumption of unfitness resulting from convictions of corruptly bribing the meat inspector assigned to the plant, the mitigating circumstances in *Utica* are sufficient to overcome the presumption of unfitness. In any event, the "replacement" Judicial Officer did not in any manner express disagreement with the Judicial Officer's application of his interpretation of the circuit court's decision. The "replacement" Judicial Officer expressed disagreement only with the Judicial Officer's interpretation of the circuit court's decision.

peals decision adversely affects a nationwide program. Complainant fears that such a policy of not following the *Utica* decision outside of the Sixth Circuit will be onerous to the Department and result in confusion (Memorandum in Support of Petition for Reconsideration filed September 9, 1983, in *Utica* by complainant, at 10). However, complainant's fears are unfounded. This policy changes *nothing* that complainant or a future respondent will have to do. It determines only what the ALJ's and Judicial Officer will do.

As stated in the Judicial Officer's Decision and Order on Remand in *Utica* (slip op. at 15), until this issue is definitively resolved, mitigating evidence should be received and considered in all cases. The only difference in treatment will be that in cases in which an appeal does not lie to the Sixth Circuit, the ALJ's and the Judicial Officer will decide cases involving convictions for bribery and related offenses under the *per se* rule, and indicate their views as to mitigating circumstances by way of *dicta*. However, in cases where an appeal lies to the Sixth Circuit, the *per se* rule will not be used by the ALJ's and the Judicial Officer.

(f) District Court's Second Utica Decision.

On appeal to the United States District Court, Judge Taylor again upheld the Department, agreeing with the "replacement" Judicial Officer's views, and strongly disagreeing with Judicial Officer Campbell's views. Judge Taylor stated (*Utica Packing Co. v. Block*, No. 80-72742, slip op. at 7-17 (E.D. Mich. Mar. 12, 1985)):

Following the judicial officer's [i.e., Campbell's] consideration of all the mitigating circumstances in this case, he concluded that the Act requires that any person who is convicted under 18 U.S.C. § 201(b) be considered unfit to receive federal inspection regardless of mitigating circumstances. Thus, *Utica* is unfit to receive such services as a matter of law, so long as David Fenster is involved with the plant. But contrary to this conclusion, Judicial Officer Campbell felt compelled by the Sixth Circuit to dismiss the complaint because, if mitigating circumstances are capable of outweighing the bribery conviction, he could imagine none weightier than Fenster had advanced.

* * * * *

This court finds that Judicial Officer Campbell's decision is unsupported by substantial evidence in the whole record and that the decision is contrary to overwhelming evidence and to his own findings and conclusions. If this case were

not being otherwise decided this court would be compelled to reverse the Campbell decision. 21 U.S.C. § 671 states that the Secretary may, after a hearing and determination that the recipient of inspection services is unfit to engage in business which involves inspection, withdraw inspection services if the recipient commits a felony or more than one nonfelonious violation of law. It is undisputed that David Fenster bribed the federal meat inspector. This bribery, had it been effective, would have caused unwholesome meat to enter the stream of commerce.

Judicial Officer Campbell considered all the mitigating circumstances as the Sixth Circuit had required. He concluded that given the serious circumstances of Fenster's felony conduct, he should not be permitted to remain in contact with Utica despite the mitigation presented. At that point, we must agree with Mr. Franke, Judicial Officer Campbell had done everything that the Court of Appeals had ordered him to do. But Judicial Officer Campbell nevertheless felt "compelled" by the court to dismiss the complaint. So even though he stated in his opinion seven times that the weight of each of the mitigating circumstances presented was insufficient he ruled that if mitigating circumstances *must* be considered, he could not imagine any stronger mitigating circumstances than Fenster had argued, so they must be sufficient in the eyes of the Sixth Circuit. Upon such finding, he dismissed the complaint against Utica. Indeed, this is a gross misinterpretation of the Court of Appeals' order and sufficient basis for Mr. Campbell's replacement [by Mr. Franke for the purposes of this case].

* * * * *

Defendants ask for judgment because Assistant Secretary Franke's final decision of March 19, 1984 is supported by substantial evidence on the whole record, and the law. This court so finds. The Sixth Circuit held that the underlying facts will determine whether a particular conviction may warrant withdrawal of inspection. The court also held that in situations, in which the felonious conduct strikes closely to the policies of the Act, a determination of unfitness may be premised upon the conduct alone. *Utica Packing Company*, slip op. at 5. Upon consideration, Mr. Franke decided that the bribery of an inspector in this case strikes

at the very heart of the program. Even after a balancing of the mitigating circumstances, Utica was unfit to be a recipient of federal meat inspection as long as Fenster was associated with the plant. *Accord, Wyszynski Provision Co., Inc. v. Secretary of Agriculture*, 538 F. Supp. 361 (E.D. Penn. 1982). Mr. Franke based his assessment upon the same facts which were before Judicial Officer Campbell. Mr. Franke states his agreement with Judicial Officer Campbell's original decision and with this decision on remand, except for the concluding abdication to the Court of Appeals. When Fenster was convicted in 1978, Judge Philip Pratt found overwhelming evidence that bribes had been offered to encourage more relaxed inspection of Utica's hogs. 449 F. Supp. at 438-39. This court made a similar determination that the evidence revealed an intent to "facilitate the sale of arguably unwholesome food." 511 F. Supp. at 662. As pork consumers must rely for their health upon the integrity of such plant management and upon the meat inspection services provided by law, this program must not be emasculated. There is far more than substantial evidence in this case to support the Assistant Secretary's decision. For these reasons, this court finds that Mr. Franke's order must be fully enforced and summary judgment will be entered for defendants affirming the Assistant Secretary's decision.

The district court's second *Utica* decision is significant in two respects. First, by disagreeing with the Judicial Officer's interpretation of the circuit court's *Utica* decision, it puts a judicial gloss on the circuit court's opinion.¹⁶

Second, it shows from a practical standpoint the wisdom and reasonableness of the *per se* approach in cases involving conviction for bribery and related offenses, thereby providing further support for the *per se* approach in the present case. That is, the only reason the Judicial Officer held on remand that Utica was fit to receive inspection was that it was impossible to "reasonably imagine any stronger mitigating circumstances than appear here [in *Utica*]" (slip op. at 28). Hence, from a practical standpoint, when the district court upheld the "replacement" Judicial Officer's decision on reconsideration that the mitigating circumstances in *Utica* were

¹⁶ I am not sure what the "gloss" is except to assert that I was wrong in my *interpretation* of the circuit court's remand decision. If I was wrong in my *interpretation*, I do not have the slightest idea why the circuit court reversed my original *per se* approach (see subsection 5(c), *supra*).

not enough to overcome the presumption of unfitness resulting from the bribery convictions, its holding suggests (from a practical standpoint) that no other mitigating circumstances will ever be enough to overcome the presumption of unfitness resulting from bribery convictions.

(g) *Circuit Court's Second Utica Decision.*

On appeal, the circuit court reversed the district court's decision on the ground that the replacement of the Judicial Officer with Assistant Secretary Franke violated Utica's right to a "fair trial before a fair tribunal" (*Utica Packing Co. v. Block*, 781 F.2d 71, 77-78 (1986)). The court remanded the proceeding to the district court, with "directions to remand it to the Secretary for re-entry of Judicial Officer Campbell's order dismissing the complaint against Utica and Fenster" (781 F.2d at 79).

However, what is important here is that the circuit court cast doubt as to the validity of Judicial Officer Campbell's *interpretation* of its original remand order. The circuit court stated (781 F.2d at 78-79; emphasis added):

Nothing in this opinion should be perceived as minimizing the seriousness of Fenster's criminal activities. Bribing an inspector does strike at the heart of the meat inspection program and cannot be tolerated. As we wrote in our earlier unpublished opinion in this case:

The more closely the conduct strikes to the policies of the Federal Meat Inspection Act, the more likely it alone will support a determination of unfitness regardless of the mitigating facts present. See *Wyszynski Provision Co., Inc. v. Sec. of Agriculture*, 538 F. Supp. 361, 364 (E.D. Pa. 1982).

Judicial Officer Campbell properly concerned himself with the nature of Fenster's criminal activities and the possible harm to the public which could flow from them. It is not certain that Campbell properly *construed* this court's remand order in considering mitigating circumstances. However, that is not the issue presently before us. Whether the Judicial Officer was correct or incorrect in his *application* of the law, the Secretary's efforts to change the result by the methods described in this opinion cannot be permitted to succeed.

The judgment of the district court is reversed, and the case is remanded with directions to remand it to the Secre-

tary for re-entry of Judicial Officer Campbell's order dismissing the complaint against Utica and Fenster.

It should be noted that these are gratuitous comments, unnecessary to the court's decision.¹⁷ This again adds a judicial gloss to the circuit court's first decision in this case. Since the circuit court's first *Utica* decision, as I interpret it, is egregiously erroneous, I am only too happy to accept the hint in the circuit court's *dicta* that perhaps I incorrectly interpreted the circuit court's first decision in *Utica*. If I did incorrectly interpret the circuit court's remand decision, the only other *possible* (valid) ground on which the circuit court could have reversed my *per se* approach was that the court was not certain whether or not the USDA proposition underlying that approach is correct (see subsection 5(c), *supra*).

Accordingly, in future cases in the Sixth Circuit, I will construe the circuit court's first *Utica* decision as requiring a consideration of the mitigating circumstances merely because the court was not sure whether the USDA proposition underlying the *per se* approach is correct or not. That leaves the Judicial Officer free to believe (when he is considering the mitigating circumstances) that there is no set of mitigating circumstances that can overcome the presumption of unfitness resulting from convictions of corruptly bribing the meat inspector assigned to the plant. Under that view, it is a foregone conclusion that in such bribery cases, Judicial Officer Campbell will *never* find the mitigating circumstances to be sufficient to overcome the presumption of unfitness, but a reviewing court will then have the opportunity to determine, case by case, whether it finally concurs in the *per se* approach or whether it finds, in a particular case, that there are enough mitigating circumstances, in its opinion, to overcome the presumption of unfitness. (I will, however, in *dicta*, express my views as to how I would have decided the case if my original interpretation of the circuit court's first *Utica* decision is correct (see subsection 5(c), *supra*)).

¹⁷ Since the court was indulging in *obiter dicta*, it would have been helpful if the court had been a little more positive as to whether it disagreed with the Judicial Officer's construction, i.e., interpretation, of the court's remand order, and a little more informative as to why the circuit court reversed the Judicial Officer's *per se* approach, which had been affirmed by the district court's first decision, if the circuit court did not mean to hold in its first decision that *theoretically*, at least, in some future *hypothetical* case, some set of mitigating circumstances could be sufficiently strong so as to overcome the presumption of unfitness resulting from felony convictions of corruptly bribing the meat inspector assigned to the plant.

6. Stevens Foods, Inc.

In *In re Stevens Foods, Inc.*, 40 Agric. Dec. 1288 (1981), the Judicial Officer withdrew meat inspection service and meat grading and acceptance services indefinitely from Stevens Foods, Inc., and from any establishment with which Steven L. Aaron is responsibly connected.

The withdrawals were based on the fact that Stevens Foods and Steven L. Aaron were each convicted of 48 felony counts of conspiring to defraud the United States, making false statements to the government, and bribery of government personnel. The convictions included 35 counts of bribery involving the giving of gratuities to the meat inspector at the plant "for or because of any official act performed or to be performed by such public official" (18 U.S.C. § 201(f)).¹⁸ The Judicial Officer refused to consider mitigating circumstances because conviction under Count 1 of the felony indictment for conspiracy to engage in deliberate conduct to defraud the Defense Department by intentionally preparing substandard meat for use on military contracts conclusively shows that the inspection service cannot depend on the reliability and integrity of Steven L. Aaron and Stevens Foods. However, the Judicial Officer indicated that in the case of bribery convictions under 18 U.S.C. § 201(f), the gratuity section, the Judicial Officer ordinarily would consider mitigating circumstances where the bribery occurred prior to publication of the Department's Policy Statement on June 26, 1979. Specifically, the Judicial Officer stated (40 Agric. Dec. at 1296-99, 1304):

Under the statutory language involved in this proceeding (21 U.S.C. § 671), conviction of a single felony may be the basis for a determination, after hearing, that a recipient is unfit to engage in any business requiring inspection. "However, inspection services are not to be withdrawn automatically because of the conviction of a felony. The felony must be of such nature as to support a finding that the recipient is 'unfit to engage in any business requiring

¹⁸ § 201. *Bribery of public officials and witnesses*

. . .

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official . . .

Shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

inspection' as a result of that felony (21 U.S.C. § 671)." *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 394 (1979), *aff'd*, No. H79-210 (D. Conn. Feb. 6, 1981) (court opinion attached).

In *Norwich Beef*, it is explained that federal inspectors cannot watch every operation at a meat plant and, therefore, the inspection service must be able to depend upon the reliability and integrity of the plant's management so as to be able to protect the public interest by assuring that meat and meat food products distributed from the plant are wholesome, not adulterated, and properly marked, labeled and packaged (38 Agric. Dec. at 394-96).³ It is explained in *Norwich Beef* that whether a felony conviction is of such a nature as to support a finding that the respondent is "unfit to engage in any business requiring inspection" depends on whether it shows that the inspection service cannot depend on the reliability and integrity of the respondent so as to adequately protect the public interest (*id.*).

³ Similar testimony was given in this case by Robert Gonter, Director, Evaluation and Enforcement Division, Compliance Programs, Food Safety and Quality Service, U.S.D.A. (Tr. 19-20, 39-41, 46), and similar views are set forth in the Department's policy statement as to withdrawing inspection, grading and acceptance services based on convictions for bribery and related offenses (44 Fed. Reg. 37322, 37323 (1979)).

Although respondents Steven L. Aaron and Stevens Foods, Inc., were convicted of 48 felonies involving violations in 1972, 1973, 1974, 1975 and 1976, I would determine on the basis of Count 1 alone that Steven L. Aaron [footnote omitted] and Stevens Foods, Inc., are unfit to engage in any business requiring inspection.

Count 1 of the felony indictment against Steven L. Aaron and Stevens Foods, Inc., under 18 U.S.C. § 371, is based on a conspiracy to engage in deliberate conduct to defraud the Defense Department by intentionally preparing substandard meat for use on military contracts (including meat previously rejected by military inspectors), processing the meat in an unauthorized area not subjected to government inspection, concealing the substandard meat under conforming meat, substituting different samples for meat selected by military inspectors for inspection, fraudulently changing the lot numbers and military contract data on shipping containers, lying to military inspectors

about the intended use of nonconforming meat, causing false Certificates of Inspection to be prepared, and giving gratuities to inspectors to result in ineffective inspection so that Stevens Foods, Inc., could continue to produce and deliver a product of less value than that for which the Department of Defense had contracted (Finding 5).

Conviction of Count 1 of the felony indictment shows beyond a doubt that the inspection service cannot depend on the reliability and integrity of Steven L. Aaron and Stevens Foods, Inc., and would be unable to protect the public interest if inspection service were to be provided to them.

* * * * *

The remaining 35 counts of the indictment are based on violations of 18 U.S.C. § 201 (entitled "Bribery of public officials and witnesses") occurring in 1972, 1973, 1974 and 1975. The specific subsection of 18 U.S.C. § 201 involved in this case is subsection (f), which is a lesser bribery offense than a violation of subsection (b), requiring proof that the bribe was "corruptly" given "to influence" or "induce" action. Where the more serious violation of 18 U.S.C. § 201(b) is involved, it has been held that conviction of bribery under that subsection compels a determination that the respondent is unfit to receive inspection service, and that it is not appropriate to consider any other facts and circumstances, such as respondent's reputation in the community or present compliance with the Act. *In re Utica Packing Co.*, 39 Agric. Dec. 590, 600-05 (1980), *aff'd*, No. 80-72742 (E.D. Mich. Apr. 14, 1981) (court opinion attached).

However, where the bribery conviction is based on the gratuity section, 18 U.S.C. § 201(f), as in this case, and the offenses occurred prior to publication of the Department's policy statement setting forth the policy of the Food Safety and Quality Service to seek the indefinite withdrawal of inspection, grading and acceptance services in every case of a conviction of "bribery and related offenses such as the giving of unlawful gratuities to public officials" (44 Fed. Reg. 37322, 37323 (1979)),⁵ I would ordinarily consider all of the facts and circumstances in the case, including any circumstances of a mitigating nature, since the industry was not on notice as to how serious the Department re-

garded "gratuity" convictions. But as to bribery and related "gratuity" offenses occurring after the publication of the policy statement, I would not ordinarily consider any mitigating circumstances because I concur in the views set forth in the policy statement that "the giving or offering of bribes or gratuities to Federal inspection or grading personnel . . . pose a direct and tangible threat to the integrity of the inspection and grading systems," warranting the indefinite withdrawal of inspection, grading and acceptance services (*id.*).⁶

⁶ Where appropriate, the Food Safety and Quality Service might agree to settlements "which include a provision which assures a complete divestiture, by all convicted individuals, of their entire ownership interest in and operational control or direction of the establishment in question, and the termination of all associations between the convicted individual or individuals and the establishment in question . . . These settlements may also include a provision for actual withdrawal of services for a specified period of time" (44 Fed. Reg. 37322, 37323 (1979)).

⁶ "The Department has recognized the seriousness of such offenses in dealing with its own personnel, who have been subjected to immediate suspension without pay upon being charged with such offenses, and have been dismissed based upon the conviction for such offenses" 44 Fed. Reg. 37322, 37323 (1979).

In this case, I have not considered any mitigating circumstances relating to the "gratuity" convictions because Count 1 of the indictment shows that the gratuities to the inspectors were part of an overall conspiracy to defraud the Department of Defense (Count 1, §§ 33-35), i.e., it "was a further part of said conspiracy that said gratuities would result in ineffective inspection by the Department of Defense and the Department of Agriculture so that STEVENS could continue to produce and deliver a product of less value than that for which the Department of Defense had contracted" (Count 1, § 35). Accordingly, Count 1 forcefully proves that the gratuity violations in this case are of such a nature that the inspection service cannot depend on the reliability or integrity of Steven L. Aaron and Stevens Foods, Inc., in its effort to protect the public interest.

* * * * *

Even if I were to consider respondents' alleged mitigating circumstances, they would not change my views set forth above.

For example, some of Steven L. Aaron's friends and business acquaintances consider him as reputable, respon-

sible, honest, truthful, a good citizen, and a good family man. They would be willing to continue to loan him money and do business with him. But similar testimony is adduced in almost every case, no matter how serious or flagrant the violations (see the quotation from *Utica*, *supra*, 39 Agric. Dec. at 604). Accordingly, I would give no significant weight to such testimony.

Since 16 of Thomas Burke's 23 payments resulting in the convictions involved here occurred after publication of the Department's Policy Statement (see § II, *infra*), the *dicta* in *Stevens* supports the view that mitigating circumstances should not be considered in the present case.

7. *National Meat Packers, Inc. (Charles D. Olsen).*

In *In re National Meat Packers, Inc.*, 38 Agric. Dec. 169 (1978) (decision as to Charles D. Olsen), the Judicial Officer withdrew meat grading and acceptance services from Olsen and any plant with which he was responsibly connected for a period of 10 years.

The withdrawal was based on the fact that Olsen was convicted under 18 U.S.C. § 201(f) of one count of giving a gratuity (\$100) to a meat grader "for or because of any official act performed or to be performed by such public official" (18 U.S.C. § 201(f)). In issuing the 10-year suspension order, the Judicial Officer stated (38 Agric. Dec. at 172-73, 177-78, 180):

5. In southern California between 1974 and 1976, 17 meatpacking houses and 35 employees of meatpackers⁴ were indicted and convicted of either bribery or illegally giving gratuity to meat graders. The involved plants constituted "a major part of the slaughtering companies or those using Federal grading service" in southern California (Tr. 19).

⁴ The 35 employees worked for the 17 indicted companies as well as 9 other packinghouses.

Sixteen Federal meat graders were indicted and convicted of receiving money.

* * * * *

. . . [T]he evidence in this case, including the sentencing memorandum prepared by respondent's attorney, shows that the "giving and receiving of gratuities between packers and USDA graders is a practice of some twenty or more years standing in the southern California area," and that "payments to the Graders in the Los Angeles area

ran as high as \$300.00 per week but were limited to \$100.00 in San Diego insofar as Mr. Olsen was involved" (RX 3, p. 2). . . .

* * * * *

There is no basis for determining in this proceeding whether the longstanding practice of bribing meat graders in southern California originated, as the graders contend, at the solicitation of the packers in return for upgrading beef of a lower quality, or as the packers contend, as a result of extortion by the graders. But in either event, the damage to the program from bribery is so great that a most severe sanction is necessary to prevent recurrence of such violations in the industry.

* * * * *

Respondent argues that he is 56 years of age and that a "ten-year withdrawal of grading as advocated by the Department would effectively deprive Charles Olsen of his livelihood in the meat packing business for the remainder of his employable life" (Response in Opposition to Appeal, p. 5). But that result is not too harsh, considering the serious nature of respondent's violation. The meat graders who accepted the bribes were fired from their jobs and will never again be employed as meat graders. A 56-year old lawyer who engaged in bribery in connection with his law practice could expect to be deprived of his livelihood as an attorney for the remainder of his employable life. Hence the respondent's sanction is not inappropriate considering the serious nature of bribery of a Government meat grader.

The fact that respondent Olsen cooperated with the United States attorney in obtaining the conviction of Hugo Lueck, a USDA grader not referred to in the indictment, was a relevant factor in reducing his criminal sentence. But it is irrelevant in determining what type of sanction is required to enable the Secretary to achieve the purposes of the remedial statute involved here.

* * * * *

The 10-year withdrawal of meat grading as to respondent Olsen is, of course, substantially more severe than the

10-year isolation from meat graders applicable to the individuals who were involved in the consent proceedings. But, as explained above, the consent sanctions are not relevant in determining the sanction that should be imposed in a litigated case. The circumstances that induced the Department to offer more lenient sanctions to the meatpackers and individuals who promptly consented to remedial orders are not present in this case. For example, it was administratively desirable to obtain consent settlements, with affirmative action programs by the meatpackers, in as many cases as possible to immediately clean up the deplorable situation which affected a major part of the slaughtering companies using Federal grading service in southern California. Also, it was administratively desirable that graded meat should remain available to consumers in southern California. To achieve these ends, a balance had to be struck between the desirability of imposing severe sanctions to serve as effective deterrents to future violations and the desirability of inducing the violators to sign immediate consent settlements, with affirmative action programs.

But where an individual did not agree to become a part of the immediate industry clean-up, there is no need to strike a balance between such conflicting considerations.

The decision in *National Meat Packers* also describes the consent orders issued in many cases prior to the Department's 1979 Policy Statement referred to in subsection 1, *supra*. Under the consent orders, persons convicted of bribing or giving illegal gratuities to meat graders had meat grading services withdrawn for 12 months and inspection service withdrawn indefinitely, but with such withdrawals held in abeyance provided that the plants took detailed precautionary steps for the next 10 years to insure future compliance with the Department's programs, and the convicted individuals were completely isolated from federal meat graders or inspectors for 10 years (38 Agric. Dec. at 173-76). The 1979 Policy Statement explains that such isolation provisions will no longer be included in consent settlements.¹⁹

¹⁹ Problems involved in enforcing the "isolation" provisions of the consent orders are discussed in *In re Apex Meat Co.*, 39 Agric. Dec. 560 (1980) (complaint dismissed because facts did not establish violation of isolation provisions), and *In re Great Western Packing Co.*, 39 Agric. Dec. 1358 (1980) (withdrawal and denial of inspection and grading services made effective because of violations of isolation provision), *aff'd*, No. CV 81-0584 (C.D. Cal. Sept. 30, 1981).

8. *William H. Hutton.*

In *In re Hutton*, 38 Agric. Dec. 332 (1979), *appeal dismissed*, No. 79-0634-N (S.D. Cal. May 12, 1980), *final order*, 39 Agric. Dec. 355 (1980), the Judicial Officer withdrew meat grading and acceptance services from Hutton and any plant with which he was responsibly connected for a period of 10 years.

The *Hutton* case is identical to *National Meat Packers* discussed immediately above in subsection 7, and involves convictions under three counts of giving gratuities to a meat grader "for or because of any official act performed or to be performed by such public official" (18 U.S.C. § 201(f)).

On appeal, an agreement was reached "for settlement purposes only, that the respondent would immediately withdraw his appeal, with prejudice, and the Judicial Officer would amend his Order" (*In re Hutton*, 39 Agric. Dec. 355 (1980)). The amended order suspended the 10-year withdrawal of meat grading and acceptance services, provided (39 Agric. Dec. at 355-56):

. . . William H. Hutton does not, for the term of this Order, become an officer, director, partner, substantial investor or supervisor in any establishment requiring federal meat grading and acceptance services; and provided further, that respondent, William H. Hutton does not assume, for the term of this Order, any employment or do any acts that would entail direct or indirect review of federal meat grading and acceptance determinations and activities.

9. *Indiana Slaughtering Company.*

In *In re Indiana Slaughtering Co.*, 35 Agric. Dec. 1822 (1976), *aff'd sub nom. Indiana Slaughtering Co. v. Bergland*, No. 76-3949 (E.D. Pa. Aug. 1, 1977), the Judicial Officer entered an order agreed to by the parties indefinitely withdrawing meat inspection services from respondent, but with the withdrawal of inspection suspended for so long as Leon Netzman is not associated with respondent or its successors in any manner and provides no direction or advice to respondent or its successors, and has no contact or dealings with federal meat inspection or grading personnel, and respondent does not within 5 years offer money or other things of value to any meat inspector, meat grader or other public official (35 Agric. Dec. at 1833).

The case was instituted after Leon Netzman was convicted under 18 U.S.C. § 201(b)(3) and (f) of "four felonies for giving a thing of value, otherwise than as provided by law for the proper discharge of official duty, to public officials, to wit, a meat inspector and a

compliance officer of the United States Department of Agriculture, for and because of official acts to be performed by said officials" (35 Agric. Dec. at 1832).

Since the order issued in the case was agreed to by the parties, it is not relevant in determining the sanction in litigated cases (*In re Worsley*, 33 Agric. Dec. 1547, 1569 (1974)), but the *dicta* in the case makes it clear that mitigating circumstances are not relevant where the felony convictions involve bribery of a meat inspector. The Judicial Officer stated (35 Agric. Dec. at 1830-31):

Although it is not necessary to consider the merits of respondent's defense if the case had proceeded to a full hearing, the transcript of the interrupted hearing shows that respondent would have fared no better after a full hearing than under the consent agreement.

* * * * *

Although the extenuating circumstances referred to by respondent's counsel were relevant in the criminal proceedings, they are totally irrelevant in this administrative proceeding. This is not a proceeding to punish respondent. It is a proceeding designed to achieve the purpose of remedial legislation administered by this Department. It is the policy of this Department to impose severe sanctions for serious violations of the regulatory programs administered by the Department in order to serve as an effective deterrent not only to the respondent, but also to other potential violators [footnote omitted]. Personal circumstances, *e.g.*, relating to a violator's present health, need to work, or prior tragic experiences⁷ are not relevant considerations in such an administrative proceeding, under the Department's settled sanction policy. Consideration of such circumstances would not be conducive to achieving the purposes of the remedial legislation, and, therefore, would not be in the public interest [footnote omitted].

⁷ Respondent alleges that Leon Netzman "lost his parents, brothers, sisters, and most of the rest of his family due to murder by the Nazis in World War II, and this, along with the aforementioned sentence of the court, is much more than enough suffering for one man."

10. Summary as to Per Se Policy Involving Convictions of Bribery and Related Offenses.

The industry has been on notice since June 26, 1979, that it is the view of the administrative officials charged with protecting the public health under the Federal Meat Inspection Act that the

giving or offering of bribes or gratuities to Federal inspection or grading personnel pose a "direct and tangible threat to the integrity of the inspection and grading systems," and that the Department will "institute an administrative proceeding seeking the indefinite withdrawal or denial of Federal inspection and/or grading and acceptance services from any recipient of or applicant for such services when the Department's action is based upon a criminal conviction or convictions for bribery or related offenses," including, specifically, convictions under "18 U.S.C. 209" (subsection 1, *supra*), which is the statutory provision involved here.

As shown above, where there have been convictions that strike at the heart of the meat inspection program, there is a reasonable basis for following the USDA policy irrespective of any mitigating circumstances. District judges in two cases have approved that *per se* policy (subsections 4 and 5(b), *supra*). The two courts that have disagreed with that policy have advanced no reasons in support of their view (subsections 3 and 5(c), *supra*), and one of those courts later cast serious doubt on the Judicial Officer's interpretation that the court expressed the view by implication that theoretically, at least, there is a set of mitigating circumstances that can overcome the presumption of unfitness resulting from convictions of corruptly bribing the meat inspector assigned to a plant (subsection 5(g), *supra*).

In addition, the courts that have considered the mitigating circumstances in particular cases have sustained the Department's determinations that the mitigating circumstances were inadequate to overcome the presumption of unfitness resulting from criminal convictions that strike at the heart of the meat inspection program under circumstances which demonstrate that, from a practical viewpoint, no set of mitigating circumstances will ever be found sufficient to overcome the presumption of unfitness in such case. Specifically, the mitigating circumstances that have been found sufficient to overcome the presumption of unfitness resulting from criminal convictions that strike at the heart of the meat inspection program include:

1. An unblemished record before and after the criminal conviction.
2. No difficulties with the meat inspection program before or after the criminal conviction.
3. Testimonials from friends and business associates and others who regard the convicted individual as a responsible and honest member of the business community, notwithstanding the criminal conviction.

4. Exceptionally stressful personal circumstances relating to the convicted person.

5. Real or perceived improper conduct by the inspection staff causing great harm to the packer, with no satisfaction achieved from supervisory inspection officials.

6. A belief that the inspector was soliciting a bribe.

7. A desire to have the meat inspector insure that the product produced at the plant remains wholesome, notwithstanding the bribe.

8. The withdrawal of meat inspection would adversely affect numerous packing plant employees and the community.

9. Time lapse of many years since the criminal conduct.

10. A finding by the Administrative Law Judge that recurrence of the criminal conduct is unlikely.

11. Adequate punishment in the criminal proceeding.

12. The criminal conviction involved one isolated event.

13. Adverse publicity from the criminal conviction caused loss of business to the company.

The first 10 mitigating circumstances listed above were all present in *Utica* (see subsection 5(d), *supra*), in which the district court affirmed the "replacement" Judicial Officer's determination (subsection 5(e), *supra*) that they were insufficient to overcome the presumption of unfitness resulting from the bribery convictions (subsection 5(f), *supra*).

From a realistic viewpoint, the mitigating circumstances rejected as insufficient to overcome the presumption of unfitness resulting from criminal convictions that strike at the heart of the meat inspection program demonstrate quite clearly that, as a practical matter, there are no mitigating circumstances that can overcome the presumption of unfitness resulting from criminal convictions that strike at the heart of the meat inspection program. This affords additional basis for affirming the *per se* approach adopted by the Judicial Officer here.

For the reasons set forth above, where there have been convictions for bribery or related offenses that strike at the heart of the meat inspection program,²⁰ the Department's *per se* approach is not only reasonable, but it is the *only* policy that will properly protect the public health. Assuming, however, that a reviewing court should disagree with this position, or with the view expressed in

²⁰ The "heart of the meat inspection program" is an area, not a pinpoint. The administrative determination that convictions under 18 U.S.C. § 209 fall within that area (and, therefore, are subject to the *per se* rule) is reasonable and rational, notwithstanding the fact that convictions under 18 U.S.C. § 201(b) strike closer to the center of the area than convictions under 18 U.S.C. § 209.

§ I(A) (that convictions for supplementing the salary of the meat inspector assigned to a packing plant in connection with his official meat inspection duties necessarily involve fraud in connection with transactions in food), the fact relating to the "fraud" issue and the "unfitness" issue are set forth in § II, immediately following.

II. Assuming (Erroneously) That Where There Have Been Convictions of Supplementing the Salary of the Meat Inspector Assigned to a Packing Plant in Connection with His Official Meat Inspection Duties, the Facts of Each Case Must Be Examined to Determine Whether the Convictions Are Based on "Fraud in Connection with Transactions in Food" and Render the Plant "Unfit" to Receive Meat Inspection, the Facts Here Show Such "Fraud" and "Unfitness."

The same facts that show that Mr. Burke's convictions are based on "fraud in connection with transactions in food" also show that respondent is "unfit" to receive meat inspection (unless Mr. Burke disassociates himself from respondent). Accordingly, the facts relating to both issues will be considered together.

At the outset, however, the "unfitness" issue will be determined under the assumption that even though we must consider the mitigating circumstances, we are free to adhere to our view that no set of mitigating circumstances can ever overcome the presumption of unfitness resulting from convictions of bribery or related offenses involving the meat inspector. Since that is my view, I have given careful consideration to all of respondent's mitigating circumstances, but find them inadequate to overcome the presumption of unfitness resulting from the criminal convictions. No useful purpose would be served by discussing the mitigating circumstances in detail since it is impossible for any set of mitigating circumstances ever to overcome the presumption of unfitness resulting from criminal convictions that strike at the heart of the meat inspection program, such as the convictions involved here.

Assuming further, however, that a reviewing court will not accept as valid a determination of unfitness based upon a consideration of the mitigating circumstances when the Judicial Officer has the preconceived view that no set of mitigating circumstances can ever overcome the presumption of unfitness resulting from criminal convictions that strike at the heart of the meat inspection program, the circumstances relating to "fraud in connection with transactions in food" and "unfitness" are considered in detail below, without any preconceived views.

In the criminal proceeding against Thomas Burke, he was charged with 23 counts of supplementing the salary of the meat in-

spector assigned to his plant. Count 1, which is identical to the others, except for the date and amount of the payment, is as follows (PX 12, Information at 1-2):

The United States Attorney for the District of New Jersey charges that:

* * * * *

3. At all times stated herein, Michael Gabriel, DVM, was employed by the Food Safety and Inspection Service as a Veterinary Medical Officer assigned to the Newark, New Jersey Circuit of the Meat and Poultry Inspection Program.

4. At all times stated herein, the defendant, THOMAS BURKE, was President and Chief Operating Officer of Great American Veal, Inc.

5. At all times stated herein, Great American Veal, Inc., a New Jersey corporation with its principal place of business in Newark, New Jersey, operated a slaughtering house engaged in the slaughter and boning of veal calves at 50 Avenue L, Newark, New Jersey.

6. At all times stated herein, the slaughtering business operated by Great American Veal, Inc. at 50 Avenue L, Newark, New Jersey, was subject to the regulations of the Federal Meat Inspection Act, Title 21, United States Code, Section 601, including the requirement that a certified inspector of the United States Department of Agriculture be present on the premises at all times during slaughter operations.

7. At all times stated herein, Michael Gabriel, DVM, was the certified inspector assigned to the Great American Veal, Inc. slaughtering operation at 50 Avenue L, Newark, New Jersey.

8. On or about April 10, 1979 at Newark in the District of New Jersey, and elsewhere, the defendant

THOMAS BURKE

did knowingly and willfully contribute to and supplement the salary of an employee of the United States Department of Agriculture from a source other than the Government of the United States; in that the defendant paid to

Michael Gabriel, DVM, \$150.00 in cash in connection with his official duties as the certified inspector assigned to the Great American Veal, Inc. slaughtering operation at 50 Avenue L, Newark, New Jersey.

In violation of Title 18, United States Code, Sections 209(a) and 2.

The dates and amounts of payment involved in all the counts are as follows:

Dates and Payment Amounts Involved in Criminal Violations

Count	Date	Amount	Count	Date	Amount
1	Apr. 10, 1979	\$ 150	13	Sept. 10, 1979	\$ 250
2	Apr. 20, 1979	100	14	Sept. 21, 1979	250
3	May 4, 1979	150	15	Oct. 5, 1979	190
4	May 22, 1979	90	16	Oct. 19, 1979	250
5	June 1, 1979	165	17	Nov. 2, 1979	175
6	June 7, 1979	100	18	Nov. 19, 1979	175
7	June 18, 1979	325	19	Dec. 3, 1979	190
8	July 1, 1979	325	20	Dec. 14, 1979	225
9	July 16, 1979	385	21	Dec. 28, 1979	175
10	July 27, 1979	325	22	Jan. 11, 1980	220
11	Aug. 13, 1979	400	23	Jan. 25, 1980	250
12	Aug. 24, 1979	205	TOTAL		\$5,070

The 23 payments to the meat inspector over a period of 9½ months total \$5,070. Sixteen of the 23 payments were made after publication of the Department's Policy Statement (which was well publicized in the meat industry) advising that the Administrator of the Federal Meat Inspection Program will seek the indefinite withdrawal of inspection services in all cases of bribery or related offenses, including, specifically, violations of 18 U.S.C. § 209(a), the criminal section involved here.²¹

The jury found Mr. Burke guilty of all 23 counts. The court's charge instructed the jury that the payments must have been made as compensation "for the services having to do with Dr. Gabriel's

²¹ Respondent contends that there would not have been 16 violations committed after publication of the Department's Policy Statement if the Department had ended its investigation sooner. The Department kept the investigation open for a considerable period of time in order to learn the "degree of corruption in the plant, and to find out if possible what other members of USDA were involved" (PX 1, p. 15). But, in any event, Mr. Burke's actions and convictions are to be judged by what actually occurred—not what would have occurred had the Department blown the whistle sooner.

responsibility" as a meat inspector, and that the payments must have been made knowingly and willfully "with bad purposes" to "disobey or disregard the law." The court instructed the jury as to the defendant's claim that the payments were not made voluntarily, but only because Mr. Burke feared that unless they were made, Dr. Gabriel would use his position as meat inspector in an unreasonable and punitive manner. The court further instructed the jury that the wisdom or correctness of the USDA regulations were not at issue. Specifically, the court charged the jury (PX 11, pp. 15-17, 19):

The offense has four essential elements, each one of which must be proved beyond a reasonable doubt. . . .

* * * * *

Concerning the third element, the law requires that the payments have to have been made as compensation for Dr. Gabriel's services, as a meat inspector. Thus, the Government has the burden of proving, beyond a reasonable doubt that the payments made were for the services having to do with Dr. Gabriel's responsibility as an employee of the United States Government. Accordingly I instruct you that no violation is present, merely because a private person gives money to a government employee, unless a connection is shown to exist between the public employment and the private compensation.

As to the fourth or final element that must be proved beyond a reasonable doubt, the word knowingly, as that term has been used from time to time in these instructions, means, that the act was done voluntarily and intentionally, not because of mistake or accident or other innocent purposes.

The word willfully, as that term has been used from time to time in these instructions means, that the act was committed voluntarily and purposely with specific intent to [do] something the law forbids. That is to say, with bad purposes. There're to disobey or disregard the law.

One of the defenses raised by the defendant Thomas Burke is, that he made certain payments only because he feared that unless those payments were made, Dr. Gabriel would use his position as meat inspector in an unreason-

able and punitive manner, thereby causing or threatening the defendant to suffer the loss of money and business.

The defendant therefore claims that he did not voluntarily contribute to or supplement the salary of Dr. Gabriel, an employee of the United States Government.

I have defined for you the meaning of the terms knowingly and willfully, which are the four elements of the offense charged.

If you find beyond a reasonable doubt that the defendant acted knowingly and willfully as those terms have been defined for you, then, the Government would have carried the burden of establishing the final element of the offense.

Conversely of course, if you do not so find, then you'll acquit.

* * * * *

. . . I charge you that USDA regulations are not an issue in this case. It's not your responsibility to consider, nor may you consider the wisdom or correctness of any regulations which you have heard about in this case.

During the sentencing proceeding, both Mr. Burke and his attorney advised the court that the United States Department of Agriculture would withdraw meat inspection from Mr. Burke's plant, so long as he was associated with the plant. Mr. Burke's attorney stated during the sentencing proceeding (PX 13, p. 7):

He faces, your Honor, not only what this Court can deliver in terms of sentence, he also faces, as the Court is aware, administrative action by the United States Department of Agriculture which in effect would mean that they would not inspect his premises so long as he is a partner of that organization. That means that there is going to have to be a reversal of what he does in this business. It means that he is going to have to take alternative means of support, and it is a difficult thing in these circumstances with a family, after the effort that has been made over a number of years in providing a successful function to even the City of Newark in its employment of people.

To think that Mr. Burke will not be able to continue in that business; that is severe punishment, and it is severe

punishment, your Honor, also in terms of what this period is like.

Similarly, Mr. Burke stated in a written statement used in the sentencing proceeding (RX H, Burke's Statement at 5):

As the Court is aware, I now face not only a sentence in which imprisonment is possible, but also face the almost certain potential of personally losing federal inspection.

After considering all the circumstances, the court fined Mr. Burke \$11,500, placed him on 3 years' probation, and required him to engage in community service. The court stated (PX 13, pp. 13-16; emphasis added):

The COURT: Thank you. All right, knowing of the serious interest that the government has taken in the sentence in this case, and being aware, even without that reminder, of the *serious nature of the offense charged here, and the manner in which this type of offense can undermine the functioning of any democratic government*, I've taken some pains in evaluating the materials that have been furnished to me by both sides.

I am also aware of the tendency of the courts today to resort to custodial sentences in cases of this sort in order, I believe, primarily, to demonstrate to the public at large that *this is a kind of conduct that cannot be tolerated, and that if tolerated will bring about, and I sincerely believe this, a great detriment to the system of government under which we live.*

Now, with those things in my mind, I have compared this particular defendant, and I have found two things. One, the incidents, repeated deliberate incidents, in which he involved himself, did not, however bad they were, involve the corruption, the actual corruption of the United States. *The inspector with whom Mr. Burke was dealing was in fact, not suborned, and therefore, the effect of Mr. Burke's conduct was not as devastating as perhaps it was intended to be.*²²

In the second place, I find that the areas for which change was sought illegally were not of the sort that

²² This circumstance was regarded as significant in determining Mr. Burke's punishment, but it is not significant in determining whether respondent is *unfit* to receive inspection because of the criminal convictions.

would have resulted in the injection into commerce of unwholesome food products. Thus, this was not, in my view as I heard the case, the offense of a man who was uncaring about the public consequences of his act. These two factors have led me to conclude, in view of the prior life of the defendant, that a custodial sentence would not be appropriate. However, it is not my intention, in any way, to diminish the seriousness of the offense either in the mind of the defendant or in the mind of the public, and I have, therefore, attempted to include that consideration in my formation of a sentence. It is adjudged that the imposition of term sentence is suspended. The defendant is placed on probation for a period of three years. It is a special condition of probation that the defendant engage in a community service undertaking with the direction of and approved by the United States Probation Office.

In addition, it is adjudged that the defendant do pay a fine of \$500 on each of the 23 counts totaling \$11,500. . . .

The sordid details of Mr. Burke's fraudulent endeavor to corrupt Dr. Gabriel, the USDA meat inspector assigned to his plant, are revealed in the transcript of the criminal proceeding, received in evidence in the administrative proceeding. (The jury had access to tape recordings of Mr. Burke's payments and transcripts of the tape recordings, but, unfortunately, they are not part of the administrative record, except for a few excerpts from the transcripts read into the record of the criminal proceeding.) Although I must accept at face value the criminal convictions, and could not properly attempt to reweigh the evidence introduced at the criminal proceeding, the criminal testimony is relevant here, if mitigating circumstances are regarded as relevant.

The fact of Mr. Burke's payments to Dr. Gabriel are not disputed. But whether the payments were voluntarily made by Mr. Burke or were, contrariwise, extorted by Dr. Gabriel, was an issue resolved against respondent by the jury. Hence that issue is no longer open for questioning. As stated by Mr. Burke's attorney at the sentencing proceeding (PX 13, p. 5):

At no time during the trial have we indicated, nor has Mr. Burke testified to any kind of statement which denied what was done, and that was admitted, and it was admitted not only because of the tapes, but it was admitted because it was done. What the essence of the defense was, as the Court understands, is what provocation there was. The

jury didn't agree with it, and we don't quibble with that, there's no way that we can. . . .

Dr. Gabriel testified that the payments related to overtime and to induce him to permit lice-infested calves to be placed in respondent's cooler in plastic bags for skinning in the next day or two, or after a weekend. Mr. Burke agreed (except for the "provocation").

As to the proper overtime procedure, a packing plant is free to operate overtime, but the plant must pay USDA for the overtime, and USDA, in turn, pays overtime to the inspector (PX 1, p. 14; PX 2, pp. 241-44).

As to the proper procedure for lice-infested calf carcasses, the regulations require the removal of the skin at the time of the postmortem inspection if a calf's carcass is infested with any parasite, such as lice. No discretion, in this respect, is left with the inspector (or his supervisor). Specifically, the regulations provide (9 CFR § 310.10; emphasis added):

§ 310.10 *Carcasses with skin or hide on; cleaning before evisceration; removal of larvae of Hypodermæ, external parasites and other pathological skin conditions.*

When a carcass is to be dressed with the skin or hide left on, the skin or hide shall be thoroughly washed and cleaned before any incision is made for the purpose of removing any part thereof or evisceration, except that where calves are slaughtered by the kosher method, the heads shall be removed from the carcasses, before washing of the carcasses. *The skin shall be removed at the time of postmortem inspection from any calf carcass infested with the larvae of the "oxwarble" fly (Hypoderma lineata and Hypoderma bovis), or external parasites, or affected with other pathological skin conditions.*²³

The purpose of the regulation in not permitting lice-infested carcasses to be placed in the cooler (even in plastic bags) is to prevent contamination not only of other carcasses in the cooler, but also of

²³ The ALJ sustained an objection to the introduction of the regulation (Tr. 16-17), but the criminal judge said that official notice will be taken of all the regulations "in effect at the time in question and relative to the situation that we have before us" (PX 7, p. 200). Similarly, I take official notice of the regulations (pursuant to 7 CFR §§ 1.141(g)(6), 1.145(i)). In addition, there is abundant testimony in the criminal record stating that lice-infested calves must be skinned on the killing floor at the time of the postmortem inspection, and cannot be placed in the cooler in plastic bags, and killed the next day, or after a weekend, as desired by Mr. Burke (PX 1, pp. 101-02; PX 2, pp. 215-16, 239-41; PX 3, pp. 817-18; PX 6, pp. 39, 87; PX 8, p. 62; and see Tr. 190).

the meat of the lice-infested carcass itself (Tr. 188-91; PX 1, p. 102; PX 2, pp. 215-16). As explained by Mr. Gould, Deputy Director, Compliance Division, Food Safety and Inspection Service, USDA (Tr. 189-91; capitalization in original):

- Q. WHEN THERE IS FEAR ABOUT PUTTING AN ANIMAL WITH A HIDE ON IT IN A COOLER IN WHICH THERE ARE ALREADY SKINNED ANIMALS THE FEAR THERE IS THAT THE LICE ON THE ANIMAL THAT HAS THE HIDE ON IT WILL IN SOME WAY BE COMMUNICATED TO THE ANIMALS WHICH HAVE NO HIDE ON IT AT ALL; CORRECT?
- A. YES, TO INCLUDE THE ANIMAL ITSELF THAT HAS THE HIDE ON IT. THERE'S AN OPEN CAVITY THERE.
- Q. IT'S TRUE THAT ONE OF THE REASONS FOR THE BAGGING OF THE ANIMAL IS TO PREVENT THAT KIND OF COMMUNICATION WITH THE ANIMALS THAT HAVE ALREADY BEEN SKINNED?
- A. WITH OTHER CARCASSES, YES.
- Q. IT IS ALSO TRUE, IS IT NOT, THAT ONE WAY OF SEPARATING THE BAGGED ANIMALS FROM THE ALREADY SKINNED ANIMALS IS TO PUT THEM EITHER IN ANOTHER COOLER OR IN A FAR SECTION OF THE COOLER AWAY FROM THOSE HIDES OF ANIMALS THAT HAVE ALREADY BEEN SKINNED?
- A. IT'S ONE WAY, BUT IT'S NOT THE WAY THAT THE REGULATION ADDRESSES.
- Q. BUT IT AFFECTS, DOES IT NOT, THE OBJECTIVE, IS THAT TRUE?

- A. IT POSSIBLY AFFECTS THE OBJECTIVE OF CONTAMINATING—THE POSSIBILITY OF CONTAMINATING OTHER CARCASSES, BUT NONETHELESS THERE IS A LIKELIHOOD THAT THE LICE WILL FIND ITS WAY ON TO THE CUT SURFACES, EXPOSED SURFACES OF THE CARCASSES THAT THE HIDE IS ATTACHED TO. KEEP IN MIND, IF YOU WILL, WHEN THE ANIMAL IS SLAUGHTERED THE VITAL ORGANS ARE REMOVED FROM THE ANIMAL FOR INSPECTIONAL PURPOSES, AND WE DO HAVE EXPOSURE FROM THE INSIDE AS WELL AS CERTAIN PORTIONS OF THE BREAST HAVE BEEN SKINNED BACK TO A CERTAIN DEGREE. SO EXPOSED MEAT IS AVAILABLE ON THAT CARCASS.

Dr. Gabriel testified that respondent prefers to skin calves after they have been cooled in the plant's cooler for a day or two, or after a weekend, but that the regulations do not permit that as to lice-infested calves. He testified) PX 2, pp. 215-16):

Q. What are you looking for when you look at the hide of the animal?

A. We're looking to see if there is any pathological or conditions on the hides of the animals.

Q. What type of parasitic conditions would there be? What are you looking for?

A. Something like lice, grubs.

Q. Why is it important to determine if the animal hide [h]as lice or grubs on it?

A. Because some of the plants use what we call color [cooler] skin[n]ing procedure in their calves. This plant like the hide to be on their calves to be put in the cooler and to be skinned while it is called [cooled] in the next day or the day after. It is up to the plant. So whenever we find a skin condition which will not permit the animals to go to the cooler, this is derailed out in a separate rail to be skinned on the same day of slaughter.

Q. Why must an animal that's railed out be skinned on the same day of slaughter? What's the purpose of that?

A. This is the regulation, sir.

Q. Well, do you know the purpose for the regulation?

A. Yes, sir. Because if you let this animal go to the cooler, it will be a source of contaminating the other meat.

Q. Doctor, do you—at Great American Veal, do you know what type of skinning processes they have there?

A. Yes. They have the cold skinning procedure.

* * * * *

Q. What's the purpose of the cold skinning procedure?

A. This the management of any plant that choose the procedure of the skinning and at Great American Veal the management chooses the cold skinning procedure which they would skin also carcasses after it is chilled in their cooler for a day or two or whatever their needs are, the plant needs.

* * * * *

Q. Dr. Gabriel, did Mr. Burke ever tell you why he had that procedure?

A. Yes, sir. Because he felt that when he skinned this carcass, after it will keep the bloom of the carcass and make it look much better than if it will be skinned the same day.

Q. Bloomed. Does it have anything to do with the value of the carcass?

A. Yes, sir.

Q. What is bloomed, by the way?

A. This is the color mainly of the carcass. And they feel that when it is skinned the same day it will look in bad shape then if it will be skinned the next day.

Dr. Gabriel testified that Mr. Burke told him that the value of a calf decreases by about \$25 when it is skinned on the day of slaughter (PX 2, p. 240). Mr. Burke testified that the farmer loses the money when a calf is hot-skinned (PX 10, pp. 120-21). But since respondent is in a "very competitive" market "in terms of attracting growers" to supply it with product (PX 10, p. 9), and, on the other end, respondent could lose a customer if respondent failed to supply the product required (PX 10, pp. 9-10), respondent has a

very real interest in keeping good growers satisfied with the prices received from respondent (PX 10, pp. 8-10).

Dr. Hall, who was Dr. Gabriel's supervisor, testified that the regulations require lice-infested calves to be skinned immediately on the killing floor to prevent the condition from being imparted to the meat sold to the public. He testified (PX 1, pp. 101-02):

Q. What is the regulation concerning calves that are found with lice in their skin or with a skin condition?

A. The regulations state that an animal with lice or any skin condition, that the hide must be removed on the killing floor.

* * * * *

Q. What's the reason for the federal regulation requiring that the skin on animals with skin conditions be removed immediately?

A. Well, the fear is that this disease condition of the skin will be imparted to the meat which is sold to the general public.

However, Dr. Hall testified that, in particular circumstances, he had allowed lice-infested carcasses to be placed in a cooler, but "under no circumstances overnight" (PX 1, p. 151). He testified (PX 1, pp. 141, 151):

Q. Now, doctor, if an animal has lice is it possible to put that animal in a sheet or bag and place that animal in a cooler without impairing the safety of the rest of the plant?

A. That can be done.

Q. And is that within the discretion of the veterinarian?

A. Yes. Yes. The purpose—well, all right. Yes. That would be true.

Q. And it would not be improper if he followed such procedures?

A. No. It would not.

* * * * *

Q. Under what circumstances could an inspector put lice infected calves in a shroud in a cooler?

A. Well, we have circumstances, the government says an animal, a calf with a skin condition, any skin condition, has to be killed [skinned] on the killing floor. However, if you have circumstances whereby you get a particular contaminated lot with lice or grubs or what not, and and you cannot handle them on the killing floor, there are too many, in order not to hold up the production of their plants, you might put them in the cooler.

It's my practice to find an isolated rail where there will be no contamination with those calves that are not infected and you can put them there and hold them until they can be skinned but, but under no circumstances overnight.

Acting on Dr. Hall's authorization, Dr. Prasad, a meat inspector who was assigned to respondent's plant *after* the relevant time period involved here, on occasions when the regular inspector was unavailable (PX 8, pp. 18, 21), permitted lice-infested calves to be placed in the cooler (PX 8, pp. 56-57). However, Dr. Prasad recognized that "the regulation says that you've got to have those calves skinned on the kill floor," and that when he was asked by the packing plant to let lice-infested calves be put in the cooler in a plastic bag, he had to get authorization from his supervisor, Dr. Hall (PX 8, p. 62). He testified (PX 8, p. 62; and see PX 8, pp. 56-57):

Q. Okay. You testified that when you were at the Paterson [packing] plant that there was a lice problem there, and you found lice-infested calves. Is that right?

A. Yes, ma'am.

Q. And you followed the regulations. And the regulation says that you've got to have those calves skinned on the kill floor. Is that right?

A. Right.

Q. Were you asked to put those calves in a bag, in a plastic bag by the plant?

A. The instruction has to—see, I cannot bifurcate the regulation. And still I don't bifurcate.

Any bifurcation and other ruling has to come from my supervisor if they want. Because Circuit sets its own standard. I have no right to go beyond that regulation. I have to follow that regulation.

Q. And did you follow it at the Paterson plant?

A. Yes, I did.

Q. In other words, you had the calves skinned immediately on the kill floor, right?

A. I ordered it to skin it, and then the objection came, and then the ruling came that you can use the plastic bag on it.

Q. And you ordered it because that's what the regulation said, right?

A. Right.

Q. And you have no right to disobey the regulation, do you?

A. Nobody has the right to disobey the regulation.

Turning to the evidence as to Mr. Burke's cash payments, Dr. Gabriel testified in the criminal proceeding that Mr. Burke offered to pay him cash for overtime on a number of occasions, which overtures Dr. Gabriel initially refused. Dr. Gabriel testified that he was paid about \$10 an hour for overtime, and that Mr. Burke told him he was a "fool" to work for such a low amount. Specifically, Dr. Gabriel testified (PX 2, pp. 245-46):

Q. Doctor, you had testified that Mr. Burke had begun to complain about the lice problem.

A. Yes, sir.

Q. To you. And telling you that he was losing money and everything like that. How soon after he started complaining about the lice did he first offer you cash directly for your overtime?

A. At least about 8, 10 months.

Q. All right. So he had been complaining about the lice almost from the day you got to the plant?

A. Yes, sir.

Q. All right. Now, tell us what happened in December of 1978 when Mr. Burke offered you this cash.

A. At that day I was taking that M.D. form—MB-11, which having all the overtime hours during four weeks period to be signed by Mr. Tom Burke.

And when I was giving it to him to sign it he asked me how much I'm getting for an hour of overtime. I said about \$10. He said, oh, that low, I pay twice that much. I didn't make any comment. So he told me you're a fool to accept that, I can pay you the overtime in cash.

I turned him down and took the form and left.

When Mr. Burke's offers to pay cash for overtime continued, in accordance with USDA policy, Dr. Gabriel contacted Mr. St. Pierre, an agent of USDA's Inspector General, and, with the concurrence of the Department of Justice, Dr. Gabriel was furnished with a hidden tape recorder. Dr. Gabriel then accepted Mr. Burke's cash payments, recorded the conversations, and turned the tapes, together with the cash payments, over to Mr. St. Pierre. (PX 2, pp. 244-59; PX 6, pp. 95-96)

Mr. Burke paid Dr. Gabriel \$15 an hour for overtime (PX 2, pp. 271-73, 298-300; PX 3, pp. 314, 375; PX 4, p. 32), which is about 50% more than the amount (about \$10 per hour) paid by USDA to Dr. Gabriel for overtime.²⁴

In order to prevent USDA from becoming suspicious, Mr. Burke instructed Dr. Gabriel at the end of each 2-week period how much of his overtime should be recorded on his USDA time sheets (for which Dr. Gabriel was paid by USDA) and how much would be paid in cash by Mr. Burke (PX 2, pp. 293-99; PX 3, pp. 311-12; PX 10, pp. 83-87). Dr. Gabriel testified (PX 2, pp. 293-96, 298-99):

Q. Well, what was Mr. Burke telling you when he said "You give them five and I'll give you five and one half"? [The quotation is from the transcript of the tape-recorded conversation.] What was that in reference to?

A. I give them five means the federal government and he give me the amount of hours he is going to pay me cash.

Q. And did he either at that time or subsequently give you cash for those hours?

A. Yes, sure.

Q. Why, if you know, did Mr. Burke tell you why to give them five, "them" being USDA?

* * * * *

²⁴ Some witnesses erroneously testified that \$15 per hour is about one-third more than \$10 per hour.

A. The plant of Great American Veal known to be working overtime and he wants me to put some overtime for the government so no one will notice what was going on between him and myself.

* * * * *

Q. Dr. Gabriel how did you know how many hours Burke was going to pay for and how many hours you were supposed to give to USDA according to Burke?

A. At the end of every two weeks, when I send my time and attendance sheet for the federal government, I will go to Mr. Burke and tell him about how many hours I work overtime at his plant during these two weeks. And I will have the little piece of paper the first week and the second week, how many hours and the total of the first week and the total of the second week, and the total of the two weeks. And then he will write a number about how many hours I'll give them, how many hours he will pay.

I take this little piece and then put whatever hours he told me to give the government, I give it to the government, take the little piece and push it in the garbage and that's it.

At the end of the four weeks I'll give him another little paper. The same thing, like the first two weeks. And then he will decide how many hours to go to the government and how many hours he will pay in cash, and then I'm having the MB-11 with the whole four weeks. I'll ask him to sign it and he'll sign it; and that's it.

Q. Directing your attention to May 18, Dr. Gabriel, did you have a conversation with Mr. Burke on May 18, 1979 concerning this overtime, the cash he was paying you for overtime?

* * * * *

Q. All right. According to this conversation you gave them [USDA] five of the hours. Is that correct?

A. Yes, sir.

Q. That left him [Burke] six?

A. Yes, sir.

Q. To pay for?

A. Yes, sir.

Q. Did he pay you the cash for them?

A. Did they? No. But he paid later.

Q. How much did he pay you for?

A. 90 dollar.

Q. Now, during course of that conversation Mr. Burke said to you I would like to take care of all of it, but you can't because they know you're getting some [expletive deleted] overtime.

What was that all about?

A. He wants to pay me all the hours I work for overtime at his place but because I note that it will be very noticed, and his place is known to work overtime, we discussed it before and I'm still trying to put some hours so no one will notice what's going on.

In a further effort to prevent USDA from being suspicious, Mr. Burke instructed Dr. Gabriel to submit an uneven amount of overtime to USDA on his time sheets, e.g., 5¼ hours rather than 5 hours. Dr. Gabriel testified (PX 3, pp. 380-81):

Q. Now, even later in the conversation [recorded on the concealed tape recorder] there's an exchange in which Mr. Burke says, "don't make it even." You say "sometimes it comes even." And he says, "add a quarter." A little later he says, "never make it even, it always has to be a quarter, a half, three-quarters."

What is that in reference to?

A. In reference to the hours I will put on my time and attendance sheet to be paid by the government.

Q. He's telling you not to make those hours even?

A. Yes, sir.

Q. Did he ever tell you why he didn't want you to make the hours even?

A. Yes, sir.

Q. Why, what did he tell you?

A. Because they just may notice the hours are equal or—they might suspect that something is going on between him and me in the plant.

At first, no "favors" were requested for the cash payments, but later Mr. Burke began "pressuring" Dr. Gabriel. Dr. Gabriel testified (PX 3, pp. 314-16):

Q. Did you have a discussion with Mr. Burke about what, if anything, he wanted you to do for this overtime?

A. Yes, sir.

Q. What did he tell you, if anything, in that conversation?

A. When he offered to pay me the overtime I asked him what favors he wants me to do, and he said, "No favors at all."

* * * * *

Q. Doctor, did he ask you to do anything at all for him concerning any of the regulations?

A. When he offered me the overtime he didn't ask me to do anything for paying me the overtime in cash. But later on on many occasions he was in a sense pressuring me to do things.

The "pressure" was Mr. Burke's efforts to get Dr. Gabriel to let lice-infested calves go to the cooler (in plastic bags), to be skinned in a day or two, or after the weekend, which is contrary to the regulations. Dr. Gabriel at first refused, but later accepted \$50 per week from Mr. Burke to allow this practice. Mr. Burke told Dr. Gabriel that \$50 per week was the amount he paid other inspectors (including supervisors) to allow lice-infested calves to go to the cooler. Dr. Gabriel testified (PX 3, pp. 317-18, 327-30; PX 6, pp. 321-22; PX 3, p. 321; see also PX 3, p. 375):

Q. Well, tell us what, if anything, Doctor—Doctor, tell us what, if anything, Mr. Burke asked you to with respect to the regulations.

A. He asked me to let the carcasses with the lice go to the cooler, and this is against the regulations.

²⁵ As shown below, Mr. Burke admits that he *told* Dr. Gabriel that he paid other inspectors and supervisors, but denies that he actually *paid* anyone other than Dr. Gabriel (see note 29, *infra*, and accompanying text).

Q. Did that happen on more than one occasion?

A. Yes, sir.

Q. How often did that happen?

A. Almost every time when we have lice calves to be skinned on the same day of the slaughter.

Q. Did you do it?

A. No, sir.

Q. Did he ask you to do anything else with respect to the regulations, the enforcement of the regulations?

Mr. SEGAL: Your Honor, can we have a date on these so-called events?

The COURT: If you know, could you date these events.

The WITNESS: I can't remember the exact date, but in many occasions in this tape recording, there is some conversations in regard to Mr. Burke asking me to let this calves go to the cooler to be skinned next day or sometimes to stay in the cooler over the weekend and to be skinned at the start of next week. And this is been recorded in this exhibit. [PX 3, pp. 317-18]

* * * * *

Q. Dr. Gabriel, did there come a time when Mr. Burke offered you cash that had nothing to do with your over-time or anything else.

A. Yes, sir.

Q. When approximately was that?

A. May 25, 1979.

Q. Did Mr. Burke tell you why he was offering you this cash?

A. Yes, sir.

Q. Why?

A. He wants to have the calves with lice go to the cooler and not to be skinned in the same day of slaughter as the regulations say.

Q. He offered you a specific quid pro quo for the money?

A. Yes, sir. [PX 3, pp. 327-28]

* * * * *

A. Not in—I wasn't speaking to him in the government office, in my office, but before he made the offer he walked outside and looked for an empty room in his establishment and called me. He whistled to me to come over to the other room. I went to the other room, and he offered to pay me the cash not to let this animals to be skinned in the same day of the slaughter.

Q. How much money?

A. \$50 a week.

Q. Anything else? Did he tell you anything else during that conversation?

A. Yes, sir. When I asked him 50 a week,²⁶ he said, "Yes," and he told me that offer is from his own experience of paying other people the same amounts of money.

* * * * *

Q. In what context? What was the context in which he told you that, Doctor?

A. Just because when I asked him 50, he said 50, and this is from his experience of paying other inspectors. So I told him, "You paid other inspectors \$50?"

He said, "Yes, higher-ups. Higher graders than you I paid this \$50." [PX 3, pp. 329-30]

* * * * *

Q. Did he [Mr. Burke] ever get you to change your proceedings in railing out liced cattle?

A. Yes, sir.

Q. How did he try to do that? What method did he use to try to get you to change your procedures?

²⁶ Note that Dr. Gabriel did not ask for \$50 a week, he merely asked, "50 a week?" after Mr. Burke offered him \$50 a week, to be sure of the exact terms of the offer.

A. For many occasions, he let these liced calves stay on the kill floor to the end of the kill and maybe sometimes he come to me and told me he cannot do it or someone left the plant and tried to make any excuses to let these calves go to the cooler or stay to the next day.

Q. Did he do anything else to get you to change your procedures with these calves?

A. Yes, sir.

Q. What would that be?

A. He paid me money to change this procedure.

Q. You're familiar with U.S.D.A regulations, are you not, Doctor Gabriel?

A. Yes, sir.

Q. Are you aware of any regulation which says it's permissible to pay the inspector money to get them to change the regulations?

A. Permissible?

Q. Yes, sir.

A. No, it is not permissible. [PX 6, pp. 86-87]

* * * * *

Q. Doctor, by the way, after Mr. Burke started paying you the cash, did the lice situation change?

A. Yes, sir.

Q. How did it change?

A. There was too many carcasses with lice coming to the plant.

Q. You mean there were more after he started paying you the cash?

A. Yes, sir. [PX 3, p. 321]

Dr. Gabriel testified that Mr. Burke's payments to him for over-time and for letting lice-infested calves go to the cooler lasted until he (Dr. Gabriel) was (routinely) reassigned to a different packing plant. He testified (PX 3, p. 332; and see PX 4, pp. 38-39):

Q. Doctor, you testified that after you had this conversation you met with St. Pierre and that as far as you were concerned you felt that the investigation was ended at that point. Did in fact the investigation end at that point?

A. No, sir.

Q. It continued?

A. Yes, sir.

Q. At whose direction?

A. Mr. Tom St. Pierre's direction.

Q. Did Mr. Burke pay you the \$50 a week?

A. Yes.

Q. Did he do it more than one time?

A. Yes.

Q. How long did he continue to pay you the \$50 a week?

A. From May until I left the plant, which was sometime in November, January 1980, I believe.

Q. Every two weeks he gave you a hundred dollars?

A. Every two weeks if I worked at his place, because sometimes I was scaled to go to some other plants for a period of a week or two——

Q. Every time that Mr. Burke gave you a hundred dollars did he—by the way, did he continue to pay cash, the overtime in cash?

A. Yes.

Q. Every time he gave you cash either for the hundred dollars or for the overtime, what did you do with it?

A. I go out of the plant and Mr. Tom St. Pierre will be waiting outside and he will draw his car after my mine. We will stop at one place. I will get out of the my car, go to his car, give him the recorder, initial the money, and he will initial the money and initial the tape.

Q. So each time you [were] paid cash you gave that cash to Tom St. Pierre. Is that correct?

A. The same day, sir, yes, sir.

Q. Each time you made a recording you gave the recording to Tom St. Pierre. Is that correct?

A. Yes.

Mr. Burke testified at the criminal proceeding that Dr. Gabriel extorted the cash payments from him, and that they were not made voluntarily (PX 10, pp. 43-88, 116-17). However, the jury did not believe Mr. Burke's version of the facts and, therefore, for the purposes of this proceeding, I accept Dr. Gabriel's testimony as true and correct. Although the jury's verdict is conclusive as to this matter, the transcript of the criminal proceeding includes a number of additional references to the tape-recorded conversations, which are of interest here, e.g. (PX 10, pp. 74-76, 79-80, 82-88, 106-07, 110, 114-15):

Q. Mr. Burke, I believe you testified that you were beside yourself at having to pay this money for these liced calves on a Memorial Day weekend and that you were truly upset about the fact that this money was being extorted from you, sir?

A. That's correct.

Q. Nevertheless, it is true that what you actually said on that occasion to Doctor Gabriel, "You and I are two big boys. We know there are certain things we can do together." [The quotation is from the transcript of the tape-recorded conversation.] That's not Doctor Gabriel speaking, Mr. Burke, that's you speaking, is it not?

A. Could I see it?

Mr. SEGAL: Can we have an identification?

The COURT: What's the exhibit number?

Mr. MILNER: 12a, your Honor.

* * * * *

Q. You're talking with Doctor Gabriel about these liced calves that he wants you to skin and Doctor Gabriel says to you, "This is, you know, regulations and he's doing what he's supposed to do," speaking about the inspector; is that correct?

A. Where are you on here?

Q. This is page three. Doctor Gabriel says, "This is, you know, regulations and he's doing what he's supposed to do." [PX 10, pp. 74-76]

* * * * *

Q. Right here. Beginning right there. (Indicating.) Did you find it?

A. "This is, you know, regulations."

Q. That's Doctor Gabriel speaking?

A. Yes.

Q. And you say, "Right, right," and he says, "Really?"²⁷ And you say, "Understand," and Doctor Gabriel says, "If you feel that the regulation is breaking you, you fight the regulations." And you say, "You can't." He says, "You fight the people who put these regulations. Okay?" You said, "Listen to me," and he said, "I'll listen to me," and he said, "Okay," and you say, "You and I are two big boys," right? That's what you said, right?

A. That's what I said.

Q. And he says, "Oh okay," and you say, "We know there are certain things we can do together," just like that, and he says, "Okay." And then you say, "Mr. Burke, you know, so make a deal with me."²⁸ He didn't say make a deal with me. You said it, Mr. Burke.

A. No.

* * * * *

Q. Is that an accurate transcription of what occurred, Mr. Burke?

A. I think it's part of a total conversation that went on.

Q. That's Doctor Gabriel extorting money from you, is it, Mr. Burke? That's what that is?

²⁷ The question mark after "Really," added by the reporter, would appear to be erroneous. An exclamation point would seem more appropriate.

²⁸ This again appears to be a reporter's error as to punctuation and capitalization. As shown by the following two sentences, this sentence should read: "And then you say, Mr. Burke, 'You know, so make a deal with me.'"

A. The total conversation, in my reading, it clearly reflects that. [PX 10, pp. 79-80]

* * * * *

Q. Mr. Burke, you've indicated that, in fact, it was Doctor Gabriel who was asking you for this money and not the other way around; is that correct?

A. That's correct.

Q. And that you were pressuring him—or he was pressuring you with the overtime. Isn't it a fact that you were pressuring him to let him to do what you wanted him to do with the lice calves?

A. I didn't want him to do anything differently than anybody else had done.

Q. Isn't it true that you have described this situation exactly opposite than the way it actually happened at the time the incident occurred?

A. No.

Q. Why then is it that on April 6 when you're speaking to Doctor Gabriel you say to him, "I don't want to talk to you about nothing like that in that office at all." You ask him, "Where's the microphone?"

Isn't it true that you, in fact, knew that what you were doing was wrong and that you didn't want to be in a position of possibly being recorded in this conversation?

Mr. SEGAL: Objection. We've got multiple questions.

Mr. MILNER: Yes, I'll withdraw the question.

The COURT: Yes.

BY MR. MILNER:

Q. Isn't it true that throughout listening to these tapes, Mr. Burke, that, in fact, it's Doctor Gabriel who comes to you and it's you telling him how many hours he's going to be paid for. It's not him——

A. Doctor Gabriel was making up the slips. It was him saying, "Here's how much you have for the week. How much should I give them?"

Q. On April 20 you tell him, "You give them five and I'll give them five and one-half." You're telling him.

A. From the sheet that he has written, laying down in front of me on his table.

Q. On May 18 he's asking you how much to give them, being the U.S.D.A., and you say, "Whose is this, yours?" And he says, "This is mine, yes." Referring to his overtime and you say, "Right, always give them half." It's you telling him how much to give them.

A. He's showing me the sheet there about the hours on it for each week.

Q. How do you explain this, Mr. Burke? On May 18 on page two you say, "I would like to take care of all of it but I can't because they know you're getting some overtime." How do you explain that, Mr. Burke?

A. Because we had a situation where I was forced into it and any conversations after that could go either way, whether he's catching me on the run—he wants to see me in his office. He's calling me in there. I'm trying to get out of there and get a plane to go home on Friday afternoons and he's showing me paperwork and any conversations like that would be normal. The pattern was established. He pushed me into it and it was going to continue like that.

Q. You say, "I would like to take care of all of it."

A. If he'd leave me alone and stop strangling me with unfair and unnecessary things, I would have done anything to get rid of this man.

Q. Then you say, "So give them half." You're talking to Doctor Gabriel, a man who you say is pressuring you. He's extorting this money from you. He's after you and he's got you around the throat and you say to him, "Give them half." He doesn't say that to you. He doesn't give me half. You're telling him how much to pay them and how much you're going to pay. You're telling him?

A. That's after he's got me in there going over this thing.

Q. This is the man that's got you by the throat?

A. That's right.

Q. You're telling him?

A. The very same man.

Q. On July 27, this very same man who's got you is talking to you and he says to you, "I just want, you know, you tell me how much you want to pay for the Government time." You say, "How many you got?" And then you tell him, "So give them—I take 15. Give them the rest, whatever it is."

You're the one who is telling him how much you're going to pay, Mr. Burke.

A. I think it was a well-established pattern in the beginning.

* * * * *

Q. Mr. Burke, you testified that, in effect, you weren't saving any money on this deal, yet on April 6, Doctor Gabriel says to you, "Okay. Now, you know, I will understand this is a favor from you." You say, "This is not a favor," and he says, "Uh-huh," and you say, "It's for you and it's for me. They charge me twice what you should get."

Mr. SEGAL: Your Honor, is this a question or are we just having declarations?

The COURT: The question will come. I think perhaps we're waiting for the siren.

Q. Mr. Burke, who else did you pay at U.S.D.A. besides Doctor Gabriel?

A. No one at all.

* * * * *

Q. You told Doctor Gabriel you did, didn't you?

A. I told Doctor Gabriel that to stop him from getting a complete situation going.

Q. You told Doctor Gabriel you paid other people at U.S.D.A, didn't you, Mr. Burke?

A. Yes. Doctor Gabriel is approaching me for money and I definitely told him that to stop him from extorting more money from me.

Q. In fact, you told Doctor Gabriel it was somebody above him at U.S.D.A. didn't you?

A. I believe I did.

Q. Was it Doctor Glasser?

A. No.

Q. Doctor Hall?

A. It was nobody whatsoever. I have never paid a cent to any Government employee except Doctor Gabriel.

Q. In fact, you told Doctor Gabriel you were going to pay him the same thing you were paying these other folks; is that correct?

A. That's right. To keep him in line and to keep him from asking me for crazy figures. [PX 10, pp. 82-88] ²⁹

* * * * *

Q. On April 9, you were talking to Doctor Gabriel about a calf which he said was moribund and which you said wasn't and you told him, "But the regulations are wrong. They're really wrong," didn't you, sir?

A. The part that he was reading was wrong.

Q. You didn't say the part that you're reading is wrong. You said the regulations are wrong.

A. You are looking possibly four or five hours in total of conversations and you're leaving out the other hundred or 200 hours.

* * * * *

Q. Didn't you say on April 9 to Doctor Gabriel, "But the regulations are wrong. They're really wrong and if they're wrong—" Didn't you say that, Mr. Burke?

²⁹ See note 25, *supra*, and accompanying text, for Dr. Gabriel's testimony in this respect.

A. If that is exactly what I said there in quotation marks and that's the only part of the conversation you want to look at . . .

Q. Mr. Burke, just answer the question?

A. Yes, I'm sure that I said it.

Q. And if this is wrong, you don't want to follow them, do you? [PX 10, pp. 106-07]

* * * * *

Q. Maybe you would eat that but Doctor Gabriel wouldn't have, would he? Doesn't he go on to say, "Maybe you would eat it, but don't you think, really, Tom, those people that buy the meat from you, if they know you're selling this calf, you think they will come back and take meat from you? No."

A. Conversations like this with Doctor Gabriel in such a repulsive situation of having to be in his office and handing him money can certainly not be looked at as the way, that I think at all. [PX 10, p. 110]

* * * * *

Q. And the problem was caused by him railing out all of these calves; is that correct, sir?

A. The problem was caused by him insisting to skin these calves on the kill floor. Did I say kill? Skin the calves on the kill floor.

Q. Yet on May 4, you have this conversation with Doctor Gabriel, don't you, Mr. Burke? "Right now the first thing is really—" this is you speaking. "Right now the first thing really, you know, is to—if I had known about it right away, we could come to a better understanding because it, you know, the problem with the lice. Can I put bags on them or not?"

Doctor Gabriel says, "Tom." You say, "I'm not trying to compromise you but, you know, could you bullshit them [USDA] that we killed late? There was no time or something like that, you know, because that's my biggest headache here. That's the damn lice."

Doctor Gabriel says, "You told me you were going to take care of this problem, especially with the farmers."

You said, "I did. I tried. I screamed. I carried on and everything. It improved greatly."

Doctor Gabriel says, "It improved greatly until you started paying me the overtime."

Isn't that what you said on May 4, 1979?

A. Well, I assume you're reading it and maybe I should look at it.

Q. Isn't that what you said?

A. That's what this says here, yes, that's correct.

Q. That's what you said, isn't it?

A. It's a copy of what I said. [PX 10, 114-15]

The one tape-recorded conversation that is helpful to Mr. Burke's contention that Dr. Gabriel solicited the money for permitting the lice-infested calves to go to the cooler to be skinned later is as follows (PX 10, pp. 116-17):

Q. Mr. Burke, on May 25, do you recall this exchange between yourself and Doctor Gabriel?

Tom Burke: "Could we put a plastic bag and skin them on the kill floor Tuesday morning early?"

Gabriel: "That's what you want me to do?"

Burke: "It would help me. It would really help."

Gabriel: "And you pay me overtime, my overtime and that's it."

Burke: "I don't follow you."

Gabriel: "What do you mean you don't follow?"

Burke: "What do you mean? I know. What do you mean?"

Gabriel: "You just want me to do you these favors and you pay me overtime which I work every minute of it and you know that and that's it."

Do you remember that conversation with Doctor Gabriel?

A. Yes, I do.

Q. Did you consider that conversation a solicitation to you?

A. Yes.³⁰

However, the jury considered all of the tape-recorded conversations and all of the testimony, and found that Mr. Burke voluntarily made the cash payments to Dr. Gabriel. That determination is binding here. As shown above, even Mr. Burke's attorney concedes that the "jury didn't agree" with Mr. Burke's version as to the "provocation" for the payments, and Mr. Burke's attorney said we "don't quibble with that, there's no way that we can" (PX 13, p. 5).³¹

One additional isolated incident is worth mentioning here. On one occasion, Mr. Burke asked Dr. Gabriel to let him personally have a calf Dr. Gabriel had tagged USDA condemned, so that he could eat it himself. Dr. Gabriel testified (PX 3, pp. 319-20):

Q. All right. Doctor, did Mr. Burke ever ask you to do anything against the regulations with respect to the moribund [dying] calves?

Mr. SEGAL: Objection as to doing things against the regulations. I would object to that.

Mr. MILNER: I'll rephrase the question.

Q. Did you ever have any conversation with Mr. Burke about the moribund calves after he started paying his cash for the overtime?

A. Yes, sir.

Q. Tell us what those conversations were, Doctor.

A. One of the conversations about moribund was that I tagged a carcass as USD condemned. And Mr. Burke told me that he can eat this carcass meat if I let him have it.

³⁰ See also Mr. Burke's testimony accompanying note 33, *infra*, with respect to this incident, in which Mr. Burke admits that he paid "money to Doctor Gabriel with regard to the lice and bagging."

³¹ Even if an inspector or grader used language that led the convicted individual to believe that a bribe was being solicited, that would be significant only in the criminal proceeding (by way of defense on the ground of entrapment, or in mitigation of the *punishment*), but it would not be significant in determining whether the packing plant is *unfit* to receive inspection (see *Utica*, § I(B)(5)(d), *supra*, and *National Meat Packers*, § I(B)(7), *supra*).

I said, "No, I can't let you do that. Once I tag it USDA condemned, it must be condemned and disposed as a condemned carcass."

Next day, if I remember, when I met Mr. Burke, I brought the subject again because that carcass which I tagged as USD condemned died in the antemortem area almost about two hours after I tagged it.

So I told him, "Your remember that carcass which you discussed with me yesterday?"

So he told me, "Yes."

I told him it died about two hours after I tag it.

"Would you still eat that meat?"

I think he said, "yes," something like that.

This isolated incident is not tied in with any of the payments, but it is the type of "favor" that a packing plant operator might request of a meat inspector who is on his personal payroll.

The facts set forth above show clearly that Mr. Burke's convictions are based upon "fraud in connection with transactions in food." He put the meat inspector assigned to his plant, Dr. Gabriel, on his personal payroll, paying Dr. Gabriel about 50% more for overtime than he was paid by USDA. That was a fraudulent interference with the relationship between Dr. Gabriel and his employer, USDA—an interference that would normally lead to a conflict of interest. The fact that Dr. Gabriel was an honest meat inspector and was not suborned does not detract in any manner from the fraudulent nature of Mr. Burke's convictions.³²

Mr. Burke's further payments made to Dr. Gabriel to induce him to violate the regulations with respect to lice-infested calves are additional circumstances showing "fraud in connection with transac-

³² During the administrative hearing, complainant's expert witness and attorney at times seemed to express the view that the only fraud involved relates to the payments for the lice-infested calves (e.g., Tr. 15, 46-48, 133-34). At other times, they seemed to recognize (correctly) that any payment to a meat inspector in connection with his official duties involves fraud (e.g., Tr. 17-22, 115-16, 119-20, 180). As stated by complainant's witness, Mr. Gould, "you don't have control of your program when inspectors are in business for themselves" (Tr. 180). In any event, however, the complaint is broad enough to include more than just the lice matter (in fact, the complaint does not specifically refer to the lice matter), and we are not bound here by any (erroneous) legal views expressed by the Department's attorney or witness. It is clear that respondent had a fair opportunity to present all of its defenses, by way of evidence and argument, to the matters relied on in this decision.

tions in food." It is immaterial that Mr. Burke was charged under the compensation section, 18 U.S.C. § 209(a), rather than the bribery section, 18 U.S.C. § 201(b), or the gratuity section, 18 U.S.C. § 201(f). Mr. Burke was charged with making payments to Dr. Gabriel "in connection with his official duties as the certified inspector assigned to the Great American Veal, Inc. slaughtering operation" (PX 12, Information, Counts 1-23). The *undisputed* evidence at the criminal proceeding shows that a portion of these payments, *viz.*, \$50 per week, was made for the purpose of inducing Dr. Gabriel to permit lice-infested calves to be placed in the cooler for skinning on the next day, or later. The only conflict in the testimony was whether these payments were requested by Dr. Gabriel or whether they were volunteered by Mr. Burke. Mr. Burke's admissions that the payments were made to permit the bagging and cooling of the lice-infested calves are as follows (PX 10, pp. 43, 46-50, 53, 74; emphasis added):

Q. Were you ever asked for money by Doctor Gabriel?

A. Yes, I was. [PX 10, p. 43]

* * * * *

Q. Mr. Burke, in your experience, was your request for bagging calves with lice on them something that you had not experienced before?

A. Yes, it was.

Q. Well, had you had calves bagged?

A. Yes, on several occasions I had calves bagged, yes, and I had seen them in other areas of the country, all over, calves in bags.

Q. Well, did you deem this a favor from Doctor Gabriel that you were requesting.

A. Not a favor at all. It was a normal thing that was a local rule, where a calf was put in the cooler with a plastic bag on it if it had a lice problem.

Q. In your plant today, are you permitted to bag calves and put them in the cooler?

A. Yes, I am.

Q. Who is your inspector?

A. Doctor Hall is the supervisor. My present inspector today is Doctor Prasad. Until a few weeks ago or a few months ago it was Doctor Choy, over twenty different inspectors that I had in that plant.

* * * * *

Q. Now, doctor, did there come a time when a request was made of you for any monies in connection with the bagging of calves?

A. Yes, there did. We had—I was sent for and told that we had a few dozen calves on the kill floor with lice and I was asked to—Doctor Gabriel had sent for me and he told me, "Tom, we have a lot of calves on the kill floor with lice and what do you want me to do about it?" And I said, "Just put plastic bags on them like everyone else has done."

Q. When was the occasion when you had this conversation with him?

A. This was Memorial Day weekend.

Q. Had you had a similar discussion with him at an earlier time before Memorial Day?

A. Yes, a few weeks earlier or a month earlier there was another discussion about lice.

Q. What happened on that occasion?

A. I asked him to bag the calves and put them in the cooler and he said, no, he couldn't do that and I said, "Fine. Go ahead and skin them."

Q. On this occasion, on the eve of Memorial Day, could you tell us what your conversation with him was?

A. I said, "Doctor, we're going to have problems with these calves over the long weekend and I think they should be bagged and put away." And he tried to tell me that that would be a big favor to me, that in addition to the money he was getting, he wanted more money.

Q. Did you make any reply to whether or not it was a favor or whether you wanted a favor?

A. I said, "Doctor, I don't want any favors in this plant whatsoever. I want a clean piece of meat to leave here and

what is to be done is the standard procedure to be followed." I never asked Doctor Gabriel for a favor.

Q. Now, when this Memorial Day situation occurred, did you pay money to Doctor Gabriel with regard to the lice and bagging after that?

*A. Yes, I did.*³³

Q. Did you have—did you pay him on more than one occasion?

A. Yes, I did.

Q. Did you have any multiple situations after that in which calves were bagged and hung because of the lice situation? Would that become a practice after that?

A. Yes, it did.

Q. Well, did you do it often? Was it done often?

A. No, it was very rarely, and whether that was when Doctor Gabriel was there or not, I don't remember.

Q. Well, during the time that Doctor Gabriel was there, did you have a greater or a lesser incidence of lice?

A. A much lesser incidence.

Q. And was there a necessity for bagging these lice afterwards?

A. I believe that we skinned some and bagged some.

Q. Well, then what was it that you got in return for the payment of this money?

A. I got absolutely nothing in return and I didn't want anything in return. [PX 10, pp. 46-50]

* * * * *

Q. And in connection with the lice situation, did he bring up the subject of money to you specifically then?

³³ See the testimony accompanying note 30, *supra*, with respect to this incident, in which Dr. Gabriel's exact words are quoted from the transcript of the tape-recorded conversation.

A. Yes, he did. [PX 10, p. 53]

* * * * *

Q. Mr. Burke, I believe you testified that you were beside yourself at having to pay this money for these lice-infested calves on a Memorial Day weekend and that you were truly upset about the fact that this money was being extorted from you, sir?

A. That's correct. [PX 10, p. 74]

Mr. Burke cannot here disavow his admission in the criminal proceeding that he paid money to Dr. Gabriel for permitting the lice-infested calves to be bagged and placed in the cooler, for skinning at a later date. And, as stated above, we are bound here by the jury's determination that the money was paid voluntarily, rather than extorted by Dr. Gabriel.

Mr. Burke's statement quoted above that he got "absolutely nothing in return for the payment of this money" with respect to the lice-infested calves (PX 10, p. 50) is not inconsistent with his admissions quoted above (text accompanying note 33, *supra*) that he paid Dr. Gabriel to let the lice-infested calves be placed in the cooler to be skinned at a later date (PX 10, pp. 43, 47-49, 74; see also Dr. Gabriel's testimony quoted earlier (text following note 25, *supra*) that Mr. Burke told him that he paid other inspectors \$50 per week for the lice-infested calves (PX 3, pp. 329-30), and Mr. Burke's admissions quoted earlier (text preceding note 29, *supra*) that he told Dr. Gabriel he paid other inspectors and supervisors \$50 per week (PX 10, pp. 82-88)). That is, according to Mr. Burke, there was nothing wrong with placing lice-infested calves in the cooler, since it was a practice permitted by Dr. Hall in the area (but not overnight (PX 1, p. 151)). Hence Mr. Burke could testify truthfully (from his viewpoint) that he received no favor for his money with respect to the lice-infested calves notwithstanding his admission that he paid Dr. Gabriel to induce Dr. Gabriel to follow the same practice permitted by Dr. Hall, but which would not, except for the payments, have been permitted by Dr. Gabriel.

For the foregoing reasons, Mr. Burke's convictions are clearly based upon "fraud in connection with transactions in food."

The criminal record also shows clearly that respondent is "unfit" to receive inspection service so long as Mr. Burke is associated with the plant. Mr. Burke has been convicted of criminal violations which strike at the heart of the meat inspection program. The sordid facts set forth above as to Mr. Burke's endeavors to corrupt the meat inspector by paying him 50% more than his usual over-

time pay, and later by paying him for permitting lice-infested calves to go to the cooler to be skinned later, show clearly that respondent is unfit to receive inspection so long as Mr. Burke is associated with the plant.

Respondent relies on a number of mitigating circumstances, none of which overcome the presumption of unfitness resulting from Mr. Burke's 23 misdemeanor convictions.

Assuming that Mr. Burke honestly believed that bagging the lice-infested calves could have been permitted by Dr. Gabriel under the USDA regulation, that is not a persuasive mitigating circumstance here. Instead of going through supervisory channels to (attempt to) get Dr. Gabriel to change his policy as to lice-infested calves,³⁴ Mr. Burke took the fraudulent course of paying Dr. Gabriel money to change his policy. USDA cannot place the required degree of trust in such a person (see § I(B), *supra*).

For the same reason, even if there were (i) a lack of clarity in the regulation (which is not the case),³⁵ and (ii) uncertainty as to how lice-infested calves should be handled, that would not be a persuasive mitigating circumstance. If there were a lack of clarity in the regulation, Mr. Burke would have to go through supervisory channels to obtain a policy determination rather than take the fraudulent course of paying the inspector to change his policy. USDA cannot place the required degree of trust in such a person (see § I(B), *supra*).

Respondent relies on the fact that USDA concedes that no unwholesome meat ever left respondent's plant (PX 1, p. 86; and see Tr. 189) (at least not to USDA's knowledge (Tr. 148, 192-195)). That is respondent's strongest mitigating circumstance, but it is not enough to overcome the presumption of unfitness arising from Mr. Burke's 23 criminal convictions.

The statutory provision involved here expressly refers to convictions based upon "[i] the acquiring, handling, or distributing of *unwholesome*, mislabeled, or deceptively packaged food or [ii] upon *fraud in connection with transactions in food*" (21 U.S.C. § 671, em-

³⁴ Dr. Hall, who was Dr. Gabriel's supervisor, testified that he would never permit lice-infested calves to be held overnight (PX 1, p. 151), which is what Mr. Burke paid Dr. Gabriel to do.

³⁵ As shown above, the regulation is clear and categorical, and leaves no discretion in the inspector or his supervisor to change the procedure prescribed in the regulation. Nonetheless, a Bulletin issued April 7, 1988, by Dr. McNay, Regional Director of the Meat Inspection Program, indicates that there is a "lack of uniformity in the region," and states, *inter alia*, that "All veal carcasses must be warm skinned if they show skin disease, lice, ticks, and grubs (hypoderma)." Hence it appears that not all inspectors were following the clear terms of the regulation.

phasis added). Hence Congress expressly recognized that some convictions leading to a finding of unfitness would not involve unwholesome meat. See also the district court's first *Utica* decision, subsection I(B)(5)(b), *supra* (511 F. Supp. at 661-65).

In addition, although I accept, for the purposes of this Decision, the Department's admission (or, perhaps, self-serving assertion, i.e., to avoid possible criticism for continuing the investigation for 9½ months) that no unwholesome meat ever left respondent's plant, the *undisputed* evidence is that "THERE IS A LIKELIHOOD THAT THE LICE [IN PLASTIC BAGS IN THE COOLER] WILL FIND ITS WAY ON TO THE CUT SURFACES, EXPOSED SURFACES OF THE CARCASSES THAT THE HIDE IS ATTACHED TO," since the "VITAL ORGANS ARE REMOVED FROM THE ANIMAL FOR INSPECTIONAL PURPOSES, AND WE DO HAVE EXPOSURE FROM THE INSIDE AS WELL AS CERTAIN PORTIONS OF THE BREAST HAVE BEEN SKINNED BACK TO A CERTAIN DEGREE" (Tr. 191; capitalization in original).³⁶ Perhaps the lice that found their way onto the exposed meat surfaces died in the cooler (although Mr. Gould was not sure what temperature kills lice (Tr. 193-94)). Perhaps if the lice died, they fell into the plastic bag. Perhaps if some lice adhered to the meat, Dr. Gabriel found them all. Perhaps the lice that found their way onto the exposed meat surfaces laid eggs on the meat. If they did, perhaps the eggs fell into the plastic bag. If not, perhaps Dr. Gabriel found them all. Perhaps the fact that lice crawled around on the meat does not make it "unwholesome."

Although lice infestation presents a major problem to calves,³⁷ nothing in the record suggests that lice crawling around on meat presents a health hazard to consumers. But as for me and my house, we prefer to eat meat that has not had lice crawling around on it!

³⁶ This evidence was not presented in the criminal proceeding, and came out in the administrative proceeding only on respondent's *cross-examination* of Mr. Gould, the Department's only witness at the administrative hearing.

³⁷ Both biting and sucking types of lice infest cattle. Louse infestation tends to be more of a problem during colder months when cattle have longer coats and are confined in close proximity to one another. Lice are species specific for the most part and cattle lice tend not to affect other species of animals or humans.

The major signs are itching and loss of hair in affected calves and cattle. Hair loss is self-induced due to rubbing and licking by affected animals who are greatly irritated by the lice. In severe cases, blood-loss anemia may develop due to thousands of lice draining blood from a single animal. This most often occurs in younger animals that are exposed to large numbers of lice.

Respondent also argues that Dr. McNay, Regional Director of Meat Inspection for the Northeast Region, offered to include respondent in the Department's Total Quality Control Program (under which the management of packing plants are involved in the inspection program at their plant and designated employees of the packing company are given certain responsibilities to insure a wholesome product) after Mr. Burke's criminal convictions (Tr. 169-73). However, the undisputed evidence shows that Dr. McNay merely solicited respondent's application to participate in the Quality Control Program, and he was not the person who had authority to determine whether respondent should be included in the program or not (Tr. 196-97).

Respondent contends that it had many difficulties with Dr. Gabriel, causing unnecessary production delays and losses to farmers (PX 7, pp. 223-24; PX 9, pp. 23-37; PX 10, pp. 6-38), including too many determinations by Dr. Gabriel that calves were moribund (dying), which must be condemned under USDA regulations (PX 1, pp. 94-95; PX 2, pp. 228-29; PX 5, p. 139; PX 6, p. 132; PX 7, pp. 213-14). Dr. Gabriel testified that Dr. Rellosa, staff assistant to the Regional Director, agreed with his handling of moribund calves at respondent's plant (PX 2, pp. 233-37), and Dr. Rellosa testified that Dr. Gabriel was doing what he had to do with the moribund calves—the problem was with the calves (PX 6, pp. 128-29; PX 7, pp. 151, 191). But, in any event, assuming that Dr. Gabriel was erroneously determining that too many calves were moribund, that is no excuse for making cash payments to Dr. Gabriel (for overtime). The only recourse to a meat plant that has real or perceived difficulties with the inspector assigned to the plant is to appeal to the inspector's supervisors, and their supervisors, up to and including the Secretary of Agriculture. (Appeals could also be made to Senators, Congressmen, trade associations, etc.). Real or perceived difficulties with the inspection staff is not a mitigating circumstance sufficient to overcome the presumption of unfitness resulting from criminal convictions that strike to the heart of the meat inspection program (see § I(B)(5), *supra*).

Respondent also relies on a number of letters submitted on his behalf during the sentencing proceeding, and received in evidence here (RX H). They include letters from Dr. Prasad and Dr. Hall, expressing the view that Mr. Burke is cooperative and, if given the chance, will conduct himself more cautiously and with prudence in the future, and within the confines of the law. A banker states that Mr. Burke has shown good character in his dealings with the bank. A supplier of shipping containers to respondent states that Mr. Burke is a model of probity and has never misrepresented himself

or circumstances. A creditor, who is also a friend, states that Mr. Burke has good character notwithstanding his convictions. A consulting engineer who was involved in the design of respondent's plant states that he is a responsible member of the community. A fellow church member states that he is a good citizen. The pastor of Mr. Burke's church (which he had attended for approximately one year) states that he is a respected member of the congregation and "has the ability to be a responsible member of our congregation and add support in ministering to our community." Finally, three organizations express appreciation to Mr. Burke for supplying calf parts of value to their programs. However, here, as in *Toscony* and *Utica* (see § I(B)(4), and I(B)(5), *supra*), Mr. Burke's "job-related" ³⁸ convictions outweigh the letters.

Even if I were to review the mitigating circumstances here under the strictures of the *Utica* remand order, as I originally interpreted *Utica* (see § I(B)(5)(d), *supra*), I would not regard the mitigating circumstances here as sufficient to overcome the presumption of unfitness resulting from Mr. Burke's 23 convictions, considering all of the facts and circumstances revealed in the record of his criminal proceeding, including Mr. Burke's admissions that he paid money to Dr. Gabriel in order to induce Dr. Gabriel to permit a practice that Dr. Gabriel regarded as contrary to the regulations (and which was, in fact, contrary to the regulations).

No useful purpose would be served by discussing the extent to which my views differ from those of the ALJ. There is no issue of credibility to be determined by the ALJ. In fact, the only witness who appeared before the ALJ was Mr. Gould, Deputy Director, Compliance Division, Food Safety and Inspection Service, USDA. The conflicts in the testimony occurred during the criminal proceeding. Insofar as the expressions by the ALJ and respondent are out of harmony with the views here set forth, those expressions are disapproved.

Complainant's proposed order does not contain the customary provisions permitting the convicted individual 90 days within which to disassociate himself from the packing plant and one year within which to sell his stock. Presumably, this was an oversight. If not, complainant should develop in future cases why a change of policy in this respect is appropriate.

In addition, complainant's proposed order would activate the withdrawal of inspection if respondent or "its packers, officers, directors, shareholders, employees, successors [or] assigns" committed

³⁸ The quotation is from *Toscony Provision Co. v. Block*, No. 81-1729, slip op. at 15 (D.N.J. Mar. 11, 1985).

"any felony" within 5 years. That is far too broad, and unnecessary to protect the public health.

For the foregoing reasons, the following order should be issued.

ORDER

Inspection service under Title I of the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq.*) is indefinitely withdrawn from and denied to respondent, its officers, directors, successors, assigns, and affiliates, directly or through any corporate or other device; *Provided, however,* That such withdrawal and denial of inspection shall be suspended for so long as:

(a) Thomas J. Burke is not associated with respondent, its officers, directors, successors, assigns or affiliates, directly or through any corporate or other device, as a partner, officer, director, shareholder, employee, or consultant, and for so long as Thomas J. Burke provides no direction or advice to and exercises no control over respondent, its officers, directors, successors, assigns or affiliates, directly or through any corporate or other device; *Provided, further,* That Thomas J. Burke shall be permitted to be associated with the respondent firm for 90 days subsequent to the date this order becomes final and shall have one year subsequent to the date this order becomes final in which to dispose of his stock; and

(b) Respondent, its partners, officers, directors, shareholders, employees, successors and assigns do not, within 5 years following the effective date of this order, commit any violations of any section of the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq.*) or any other statute based upon the acquiring, handling, or distributing of unwholesome, mislabeled, or deceptively packaged food or upon fraud in connection with transactions in food, or commit any violation of §§ 201 or 209 of Title 18 of the United States Code; and

(c) Within 5 years of the effective date of this order, respondent, or any of its officers, employees or agents does not unlawfully give, pay, or offer, directly or indirectly, any money or other thing of value to any meat inspector, meat grader, or other person acting on behalf of the United States Government in connection with any aspect of its operation; and

(d) Within 5 years of the effective date of this order, respondent (1) does not knowingly hire, in any capacity, any individual who has been convicted of violating the FMIA or 18 U.S.C. § 209, and (2) immediately dismisses from its employment any such individual, hired after the effective date of this decision, when that individual's conviction becomes known.

(e) The term "violate," as used herein, means a violation found upon conviction, or upon final decision in a formal adjudicatory

proceeding before the Secretary, or upon affirmation of such conviction or decision, if appealed.

And provided further, That if it is determined, after opportunity for a hearing under the Federal Meat Inspection Act, that any term of the above provision has not been or is not being complied with, the suspension will be terminated and the withdrawal and denial provisions of this order will become effective immediately.

This order shall become final and effective upon service on the respondent.

In re: LAKE COUNTRY PORK PACKERS, INC. FMIA Docket No. 96. Decided Septmeber 12, 1986.

Edward H. McGrail, Administrative Law Judge.

Harold Rueben, for complainant

Pro se, for respondent

STIPULATION AND CONSENT DECISION

This is a proceeding under the Federal Meat Inspection Act (FMIA), as amended (21 U.S.C. §§ 601 *et seq.*), and the applicable Rules of Practice (7 CFR § 1.130 *et seq.* and 9 CFR § 335.1 *et seq.*), to withdraw federal meat inspection service from Lake Country Pork Packers Co., Inc. This proceeding was commenced by a complaint filed on January 3, 1986, by the Administrator of the Food Safety and Inspection Service (FSIS), United States Department of Agriculture (USDA), who is responsible for the administration of federal meat inspection services. The parties have agreed that this proceeding should be terminated by the entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, Lake Country Pork Packers Co., Inc., herinafter referred to as respondent, admits all of the jurisdictional allegations of the complaint, and waives:

(a) Any further procedural steps;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof; and

(c) All rights to seek judicial review or to otherwise challenge or contest the validity of this decision.

2. This Stipulation and Consent Decision is for settlement purposes in this proceeding only and does not otherwise constitute an

admission or denial by the respondent that it violated the regulations or statutes involved.

3. The respondent waives any action against the USDA under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Respondent is a corporation which operates an establishment located at Route 96-A, P.O. Box 131, Ovid, New York 14521, for the slaughter of swine and for the preparation, sale and distribution of meat and meat food products for use as human food in commerce.

2. Respondent is, and at all times material herein was, the recipient of inspection services under Title I of the FMIA at said establishment.

3. Anthony DeAngelis is now, and at all times material herein was, acting as an employee in a managerial capacity with the respondent.

4. Thomas DeAngelis was, and at all times material herein, acting as Vice-President, Secretary, Manager and Stockholder of respondent.

5. On or about August 17, 1965, Anthony DeAngelis was convicted and sentenced in the United States District Court for the District of New Jersey of the offense of conspiring to transport and causing to be transported in interstate commerce warehouse receipts knowing same to have been taken by fraud and to transport and cause to be transported in interstate commerce falsely made and forged warehouse receipts, in violation of 18 U.S.C. 371.

6. On or about August 17, 1965, Anthony DeAngelis was convicted and sentenced in the United States District Court for the District of New Jersey of the offense of unlawfully and with fraudulent intent transporting and causing to be transported falsely made and forged securities in interstate commerce, in violation of 18 U.S.C. 2314.

7. On or about July 21, 1980, Anthony DeAngelis was convicted and sentenced in the United States District Court for the Southern District of Indiana of the offense of unlawfully, wilfully and knowingly, conspiring to commit an offense against the United States, in that he conspired to unlawfully, wilfully, and knowingly conceal and cover up by trick, scheme and device, material facts in a matter within the jurisdiction of the United States Department of Agriculture, a Department of the United States, in that there was a failure to disclose in applications by Meadow Meats, Inc., for federal meat, poultry or import inspection that Anthony DeAngelis

was responsibly connected with Meadow Meats, Inc., and that he had been convicted of felonies, despite the fact that the identities and felony conviction records of all persons responsibly connected with an applicant for federal meat, poultry or import inspection were required to be disclosed to the Department of Agriculture in applications for federal meat, poultry or import inspection, all in violation of 18 U.S.C. 371.

8. On or about July 21, 1980, Anthony DeAngelis was convicted and sentenced in the United States District Court for the Southern District of Indiana of the offense of devising and intending to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises and for the purpose of executing the aforesaid scheme and artifice did wilfully and knowingly cause to be delivered by mail according to the direction thereon, a letter addressed to Mr. Ted McAninch, M & R Livestock Co., in violation of 18 U.S.C. 1341; did wilfully and knowingly cause to be delivered by mail according to the direction thereon, a letter addressed to Mr. Al Farrow, Farrow Bros. Livestock Co., in violation of 18 U.S.C. 1341; did wilfully and knowingly cause to be delivered by mail according to the direction thereon, a letter addressed to Mr. Ted McAninch, in violation of 18 U.S.C. 1341; and while associated with an enterprise consisted of an association of meat processors, did knowingly, wilfully and unlawfully combine, conspire, confederate and agree to participate, directly and indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d) and 1963.

9. On or about March 1, 1985, Thomas DeAngelis was convicted and sentenced in the Supreme Court of the State of New York for the crime of Grand Larceny.

CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following Consent Decision in disposition of this proceeding, such Decision will be issued.

ORDER

Inspection services under Title I of the FMIA are withdrawn indefinitely from respondent, its officers, directors, partners, affiliates, successors, and assigns, directly or through any corporate device.

Said withdrawal of inspection shall be suspended and held in abeyance and inspection services shall be provided to respondent for so long as, in addition to all other requirements of inspection,

the conditions set forth hereinbelow are met. The Secretary shall have the right to summarily withdraw inspection service upon a finding by appropriate national headquarters staff of a violation of any special condition set forth hereinbelow. The summary withdrawal of inspection service shall be effective pending final determination of a violation in accordance with the applicable Rules of Practice. Such summary withdrawal shall have no relevance with respect to the final determination in the proceeding and will not preclude the respondent from requesting an expedited hearing.

1. Anthony DeAngelis and Thomas DeAngelis shall not associate with respondent, its successors, affiliates, or assigns, directly or through any corporate or other device, as a partner, officer, director, shareholder, consultant or employee; shall have no access to respondent's plant; shall not provide any direction or advice to or exercise any control over respondent, its successors, affiliates or assigns, directly or through any corporate or other device; and shall have no business dealings whatsoever with respondent, its successors, affiliates, or assigns.

2. Respondent shall not knowingly employ or add any individual who has been convicted, in any federal or state court of any felony, or more than one violation of any law, other than a felony, based upon the acquiring, handling, or distribution of unwholesome, mislabeled or deceptively packaged food, or fraud in connection with transactions in food; and

3. Respondent shall immediately terminate its connection with any such individual when that individual's conviction becomes known; and

4. Respondent shall not violate any sections of the FMIA, or any regulations issued thereunder; and

5. Respondent shall maintain full, complete, and accurate written records of all other business activities applicable to the FMIA, which are available for review by USDA personnel; and

6. Respondent shall afford duly authorized personnel of the USDA an opportunity to examine and to copy all such records, reports, and other documents required of the respondent in this Consent Decision.

The Order shall become effective upon issuance by an Administrative Law Judge.

In re: STATE NATIONAL PROVISIONS, INC. FMIA Docket No. 97. Decided October 9, 1986.

Victor W. Palmer, Administrative Law Judge.

Kevin Thiemann, for complainant.

Edward Ruckert, Washington, D.C., for respondent.

STIPULATION AND CONSENT DECISION

This is a proceeding under the Federal Meat Inspection Act, as amended (21 U.S.C. § 601 *et seq.*), hereinafter referred to as the FMIA, and the Applicable Rules of Practice (9 CFR § 335.1 *et seq.*), to activate the suspended withdrawal of inspection from State National Provisions, Inc., hereinafter referred to as the respondent, as specified in the Stipulation and Consent Decision and Order in FMIA Docket No. 77 filed on July 13, 1984. This proceeding was commenced by a complaint filed by the Administrator of the Food Safety and Inspection Service, United States Department of Agriculture, who is responsible for the administration of the FMIA. The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purpose of this Stipulation and the provisions of this Consent Decision only, respondent admits all of the jurisdictional allegations of the complaint, admits the Findings of Fact; and waives:

- (a) Any further procedural steps;
- (b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof; and
- (c) All rights to seek judicial review and otherwise challenge or contest the validity of this Decision.

2. This Stipulation and Consent Decision are for purposes of settlement in this proceeding only and do not otherwise constitute an admission or denial by the respondent that it has violated the regulations or statutes involved.

3. The respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by respondent in connection with this proceeding.

FINDINGS OF FACT

1. State National Provisions, Inc., respondent, is a corporation which operates a meat processing establishment at 82-86 Westerloo Street, Albany, New York 12202.

2. State National Provisions, Inc., is, and at all times material herein was, a recipient of federal meat inspection services under Title I of the Act at 82-86 Westerloo Street, Albany, New York 12202.

3. On February 27, 1984, a complaint was filed, pursuant to section 401 of the Act (21 U.S.C. § 671), by the Administrator of the Food Safety and Inspection Service of the United States Department of Agriculture seeking withdrawal of inspection services under Title I of the Act from respondent based on one (1) felony conviction of respondent.

4. On July 13, 1984, Administrative Law Judge John G. Liebert issued a Stipulation and Consent Decision in FMIA Docket No. 77 withdrawing inspection for one (1) year from respondent and its owners, officers, directors, successors, affiliates, or assigns.

5. Two (2) consecutive weeks of actual suspension from respondent, from December 23, 1984 through January 5, 1985, was required in the above-referenced Stipulation and Consent Decision.

6. The withdrawal of inspection from respondent, as set forth in the above-referenced Stipulation and Consent Decision, was held in abeyance for the remaining fifty (50) weeks for so long as certain terms and conditions were followed.

7. One of the pertinent conditions specified in the above-referenced Stipulation and Consent Decision involved the preparation, sale, transportation, or attempted distribution of any adulterated or misbranded products.

8. On or about January 24, 1985, February 26, 1985, and February 28, 1985, the respondent prepared and sold corned beef rounds, within the designated State of New York, which were adulterated and misbranded because the corned beef rounds contained more than the allowable added substance.

CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following Order and Consent Decision in disposition of this proceeding, such decision will be issued.

ORDER

1. Inspection services under Title I of the FMIA are withdrawn from and denied to the respondent, its owners, officers, directors, successors, affiliates, or assigns, directly or through any corporate or other device for a period of one (1) year beginning on October 1, 1986. Four (4) consecutive weeks of actual suspension will begin on December 5, 1986 and end on January 2, 1987. The remaining forty-eight (48) weeks of the one (1) year withdrawal period will be

held in abeyance and will not become effective for so long as, in addition to all other requirements of inspection, for one (1) year from the effective date of this Consent Decision, unless otherwise noted *infra*:

(a) Respondent does not knowingly hire or permit, to the extent allowed by New York law, the continued employment of any person who has been convicted of any violations of the FMIA or similar State and local food safety laws.

(b) Respondent designates a member of the management team to act as a quality control manager at its establishment. Said individual shall have specific authority to forbid shipment of products that have excess added substance as established by the Consent Decision and applicable USDA regulations. The name of the quality control manager will be provided to the FSIS Inspector in Charge at respondent's establishment.

(c) Respondent shall establish and implement the following monitoring program at its establishment for processing products containing added substances:

(1) After the product is accepted at respondent's establishment, said product will be placed into tanks before processing. A piece count will be made and the product weighed as an entire lot. For the purpose of this consent decision, a lot shall be defined as one (1) day's production. Moreover, at least twenty percent (20%) of the individual pieces in the tank will be individually weighed and recorded. The product will then be pumped with the permitted added substance. After pumping, the product will be placed back into tanks and weighed again both as an entire lot and as the individual pieces specified above.

(2) If the product is found to contain more than the allowable limit of added substance, said product will stand and drain until it is below the allowable limit. Once draining has been completed, said product will be weighed again to insure that it is within the allowable limit of added substance.

(3) If the product is found to be within the allowable limit of added substance, either as pumped or as drained, said product will be removed to a separate tank. The product will be given a lot number, which shall be recorded for identification at the time of packing along with the date of pumping in respondent's records. Moreover, respondent shall record the identifying lot number on the product's package.

(d) Respondent shall keep a record of the piece count, product weight prior to processing, pumped weight, drained weight (if applicable), date(s) of processing, and lot number for each lot processed. One (1) copy of said record will be attached to the processing

tank(s) for identification, one (1) copy will be provided to the FSIS Inspector in Charge at respondent's establishment, and one (1) copy will be retained in respondent's files until at least sixty (60) days beyond the end of this monitoring program.

(e) Respondent shall permit the FSIS Inspector in Charge at its establishment to take product samples of his own choosing for testing by the USDA. The number of samples provided in a given thirty (30) day period will be determined by the Meat and Poultry Inspection Office, located at 80 Wolf Road, Suite 503, Albany, New York 12205.

2. For the purposes of this Consent Decision and Order only, a "violation" involving added substances will be defined as one (1) or more product samples containing more than three percent (3%) added substance above the allowable added substance limits as set forth in the applicable USDA regulations and found in two (2) separate lots in any given thirty (30) day period. Moreover, for the purposes of this Consent Decision and Order, a violation must occur during the one (1) year period specified *supra* and be discovered by the USDA either during the one (1) year period or in the sixty (60) days immediately following the end of said one (1) year period.

3. The violation of this Consent Decision and Order, as defined in paragraph 2 *supra*, will result in the immediate withdrawal of inspection services under Title I of the FMIA. The Secretary of Agriculture shall have the right to summarily withdraw inspection service upon finding of a violation by appropriate national headquarters staff. The appropriate national headquarters staff will consider the procedures that have been implemented by respondent, the overall history of compliance, and such other factors as may be deemed relevant prior to making any final determination to summarily withdraw inspection services. Any summary withdrawal of inspection service shall be subject to respondent's right to request an expedited hearing on the alleged violation. Moreover, nothing in this Consent Decision shall preclude the referral of any such violations to the Department of Justice for possible criminal or civil proceedings.

4. If any provision of this Order is declared to be invalid, such declaration shall not affect the validity of any other provision herein.

5. This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: CHERRY MEAT PACKERS, INC. FMIA Docket No. 103. Decided October 20, 1986.

John A. Campbell, Administrative Law Judge.

Andrea Bateman, for complainant.

Michael Dockterman, Chicago, Illinois, for respondent.

STIPULATION AND CONSENT DECISION

This is a proceeding under the Federal Meat Inspection Act, as amended (21 U.S.C. § 601 *et seq.*), hereinafter referred to as the FMIA, and the Applicable Rules of Practice (9 CFR § 335.1 *et seq.*), to withdraw federal meat inspection services from Cherry Meat Packers, Inc., hereinafter referred to as the respondent. This proceeding was commenced by a complaint filed by the Administrator of the Food Safety and Inspection Service, United States Department of Agriculture, who is responsible for the administration of the FMIA. The parties have agreed that this proceeding should be terminated by entry of the Consent Decision as set forth below and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision, respondent admits all the jurisdictional allegations of the complaint, admits the Findings of Fact, and waives:

(a) Any further procedural steps;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof; and

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision.

2. This Stipulation and Consent Decision are for purposes of settlement in this proceeding only and do not otherwise constitute an admission or denial by the respondent that it has violated the regulations or statutes involved.

3. The respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by respondent in connection with this proceeding.

FINDINGS OF FACT

1. Cherry Meat Packers, Inc., is a business, incorporated in the State of Illinois, which operates a meat processing establishment at 4750 So. California Avenue, Chicago, Illinois 60632.

2. Cherry Meat Packers, Inc., is, and at all times material herein was, a recipient of federal meat inspection services under Title I of

the Act at 4750 So. California Avenue, Chicago, Illinois 60632 (Establishment No. 24).

3. On or about July 17, 1986, Cherry Meat Packers, Inc., was convicted, in the United States District Court for the Northern District of Illinois, of one misdemeanor for selling misbranded food products and one misdemeanor for offering for transportation misbranded food products, in violation of the FMIA (21 U.S.C. §§ 610(c)(1) and 676(a)).

CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following Order and Consent Decision in disposition of this proceeding, such decision will be issued.

ORDER

1. Inspection services under Title I of the FMIA are withdrawn from and denied to the respondent, its owners, officers, directors, successors, affiliates, or assigns, directly or through any corporate or other device for a period of one (1) year beginning on the effective date of this Order. This Order will be held in abeyance for that period and will not become effective:

(a) For so long as, within one (1) year of the effective date of this Consent Decision, respondent, or any of its officers, employees, or agents do not violate (as that term is defined in paragraph 2 *infra*) any section of the FMIA (21 U.S.C. § 601 *et seq.*) involving the preparation, sale, transportation, or attempted distribution of any adulterated or misbranded products; and

(b) For so long as respondent, within one (1) year of the effective date of this Consent Decision:

(1) Does not knowingly hire, in any capacity, any individual who has been convicted of any felony; and

(2) To the extent permitted by Illinois law, dismisses from its employment any such individual, hired after the effective date of this Consent Decision, when that individual's conviction becomes known.

2. The violation of any provision in paragraph 1 of this Order will result in the immediate withdrawal of inspection services under Title I of the FMIA. The term "violation" means a final decision in a formal adjudicatory proceeding before the Secretary of Agriculture or a conviction in federal or state court.

3. If any provision of this Order is declared to be invalid, such declaration shall not affect the validity of any other provision herein.

4. This Order shall become effective on the day upon which service of this Order is made upon the respondent.

DISCIPLINARY DECISIONS

In re: CALVIN HUTCHINS. P&S Docket No. 6615. Decided September 3, 1986.

Dorothea A Baker, Administrative Law Judge.

Allan R Kahan, for complainant

Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Calvin Hutchins, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 1, Box 78, Laurel Hill, Florida 32567.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account. This registration has been inactive since August 20, 1971.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Calvin Hutchins, his agents and employees, directly or through any corporate or other device, in connection with his business subject to the Act, shall cease and desist from engaging in

business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Three Hundred Fifty Dollars (\$350.00), payable by the effective date of this order.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: ROYAL J. ALEXANDER. P&S Docket No. 6628. Decided May 16, 1986.

William Weber, Administrative Law Judge.

Ben Bruner, for complainant.

Pro se, for respondent.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Royal J. Alexander is an individual doing business as LaFontaine Livestock Sale. His business mailing address is 203 S. Walnut, Box 222, LaFontaine, Indiana 46940.

(b) Respondent at all times material herein was:

(1) Engaged in the business of conducting and operating the LaFontaine Livestock Sale stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(2) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(3) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis. This registration states that LaFontaine Livestock Sale is a partnership consisting of Royal J. Alexander and Alpha B. Alexander; however, at all times material herein, Alpha B. Alexander was not a partner in such organization.

2. Respondent during the period of December 31, 1984 through January 31, 1985, failed to maintain and properly use his Custodial Account for Shipper's Proceeds (hereinafter "custodial account"), thereby endangering the faithful and prompt accounting therefor and payment of the portions thereof due the owners or consignors of livestock in that:

(a) As of December 31, 1984, respondent had outstanding checks drawn on his custodial account in the amount of \$17,095.12, and had an overdraft in his custodial account in the amount of \$1,432.29, resulting in a deficiency of \$18,527.41 in funds available to pay shippers their proceeds.

(b) As of January 31, 1985, respondent had outstanding checks drawn on his custodial account in the amount of \$11,400.80 and had an overdraft in his custodial account in the amount of \$7,444.95, resulting in a deficiency of \$18,845.75 in funds available to pay shippers their proceeds.

(c) Such deficiencies were due to the failure of respondent to deposit in his custodial account, within the time prescribed by the regulations, an amount equal to the proceeds receivable from the sale of consigned livestock.

3. (a) Respondent, in connection with his operations as a market agency selling on commission and on or about the dates and in the transactions set forth in paragraph III(a) of the complaint, sold consigned livestock and in purported payment to the consignors, issued checks which were returned unpaid by the bank upon which they

were drawn because respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

(b) Respondent, on or about the dates and in the transactions set forth in paragraph III(a) of the complaint, and in the transactions set forth in paragraph III(b) of the complaint, sold consigned livestock and failed to remit, when due, the proceeds received from the sale of such livestock to the consignors of such livestock.

(c) As of September 23, 1985, there remained unpaid a total of \$18,369.69.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 313(a)), and section 201.42 of the regulations (9 CFR § 201.42).

By reason of the facts found in Finding of Fact 3 herein, respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

ORDER

Respondent Royal J. Alexander, his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Act, shall cease and desist from:

1. Failing to deposit in his Custodial Account for Shippers' Proceeds within the time prescribed by section 201.42 of the regulations (9 CFR § 201.42), an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Failing to otherwise maintain his Custodial Account for Shippers' Proceeds in strict conformity with the requirements of Section 201.42 of the regulations;

3. Issuing checks to any person in payment of the net proceeds resulting from the sale of consigned livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented;

4. Failing to remit, when due, the net proceeds from the sale of consigned livestock in commerce on a commission basis to the consignors; and

5. Failing to remit the net proceeds from the sale of consigned livestock in commerce on a commission basis to the consignors.

Respondent is suspended as a registrant under the Act for a period of two years and thereafter until such time as he demonstrates that the deficiency in his Custodial Account for Shippers'

Proceeds has been eliminated. When respondent demonstrates that the deficiency in his custodial account has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the two year period.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR # 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order Upon Admission of Facts by Reason of Default became final on September 3, 1986.—Ed.]

In re: PALETTA BROTHERS MEAT PRODUCTS, LTD., and LARRY PALETTA, P&S Docket No. 6654. Decided September 3, 1986.

William J. Weber, Administrative Law Judge.

Allan R Kahan, for complainant.

Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents, both corporate and individual, violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Paletta Brothers Meat Products, Ltd., hereinafter referred to as the respondent, is a corporation with its principal place of business located at Coldwater, Michigan. Respondent's business mailing address is 70 Homer Drive, Coldwater, Michigan 49036.

2. Respondent is, and at all times material herein was:

(a) A packer, within the meaning of and subject to the provisions of the Act; and

(b) Engaged in the business of buying livestock in commerce for purposes of slaughter.

3. Respondent's average annual purchases of livestock exceed \$500,000.00.

4. Larry Paletta, hereinafter referred to as respondent Larry Paletta, is an individual whose mailing address is 26 Ravenscliffe Avenue, Hamilton, Ontario L8P3M4.

5. Respondent Larry Paletta is, and at all times material herein was:

(a) President and sole stockholder of respondent Paletta Brothers Meat Products, Ltd.;

(b) Responsible for the management, direction and control of respondent Paletta Brothers Meat Products, Ltd.; and

(c) A packer within the meaning of and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Paletta Brothers Meat Products, Ltd., its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with its operations as a packer, and respondent Larry Paletta, through any corporate or other device, shall cease and desist from engaging in the business of a packer, in commerce, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents Paletta Brothers Meat Products, Ltd. and Larry Paletta are hereby jointly and severally assessed a civil penalty in the amount of Five Thousand Dollars (\$5,000.00); PROVIDED HOWEVER, that Four Thousand Five Hundred Dollars (\$4,500) shall be suspended provided that respondents shall not violate the cease and desist provisions of this order.

Such order shall have the same force and effect as if entered after full hearing and shall be effective on the first day after service upon respondents.

Copies hereof shall be served upon the parties.

In re: CHESTER LIVESTOCK MARKET, INC. P&S Docket No. 6704. Decided September 3, 1986.

John Campbell, Administrative Law Judge.

Eric Paul, for complainant

Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent, Chester Livestock Market, Inc., is a corporation with its principal place of business in Chester, South Carolina. Respondent's business mailing address is P. O. Box 111, Chester, South Carolina 29706.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Chester Livestock Market, Inc., stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock in commerce on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Chester Livestock Market, Inc., its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Insofar as respondent is now in compliance with the bonding requirements under the Act and the regulations, no suspension is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of One Thousand Seven Hundred and Fifty Dollars (\$1,750.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: LOURDES G. MARQUEZ and GERARDO R. MARQUEZ. P&S Docket No. 6546. Decided July 22, 1986.

William Weber, Administrative Law Judge.

Thomas Heinz, for complainant.

Pro se, for respondent.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF
DEFAULT, AS TO RESPONDENT LOURDES G. MARQUEZ

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents violated the Act.

Copies of the Complaint and Notice of Hearing and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were personally served on the respondents. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would

constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Lourdes G. Marquez and Gerardo R. Marquez, a/k/a Lalo Marquez, hereinafter "respondents", are individuals with a mailing address at 7102 North 43rd Avenue, # 417, Glendale, Arizona 85301.

(b) Respondents, at all times material herein, were:

(1) Doing business as Boone Packing Co.,

(2) Engaged in the business of buying livestock in commerce for purposes of slaughter and manufacturing or preparing meats or meat food products for sale or shipment in commerce; and

(3) Packers within the meaning of and subject to the Act.

2. (a) Respondents, in the transactions set forth in paragraphs II and III of the Complaint and Notice of Hearing, purchased livestock for purposes of slaughter and failed to pay, when due, the full purchase price of such livestock.

(b) As of December 31, 1984, there remained unpaid by respondents \$59,495.41 for such livestock purchases.

3. Respondents, in connection with their operations as packers, on or about August 8, 1984, issued a check in the amount of \$28,292.80 to Demsey-Jamison, Inc., Peoria, Illinois, in purported payment for livestock which was returned unpaid by the bank upon which it was drawn because respondents did not have sufficient funds available in the account upon which such check was drawn to pay such check when presented.

4. Respondents, in connection with their operations as packers, have failed to create, keep and maintain accounts, records and memoranda which fully and correctly disclose their transactions subject to the Act, in that respondents have failed to create, keep and maintain a general ledger, an accounts receivable ledger, a cash receipts and cash disbursements journal, a sales journal and copies of all purchase and sale invoices.

CONCLUSIONS

By reason of the facts found in Findings of Fact 2 and 3 herein, respondents have violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).

By reason of the facts found in Finding of Fact 4 herein, respondents have violated section 401 of the Act (7 U.S.C. § 221).

ORDER

Respondents Lourdes G. Marquez and Gerado R. Marquez, directly or through any corporate or other device, in connection with any business or operation as a packer, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock;
2. Failing to pay the full purchase price of livestock; and
3. Issuing checks in payment for livestock without having sufficient funds on deposit and available to pay such checks when presented.

Respondents shall create, keep and maintain accounts, records and memoranda which fully and correctly disclose their business transactions subject to the Act, including but not limited to: (1) a general ledger; (2) an accounts receivable ledger; (3) a cash receipts and cash disbursements journal; (4) a sales journal; and (5) copies of all sale and purchase invoices.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order became final on September 9, 1986.—Ed.]

In re: LOURDES G. MARQUEZ and GERARDO R. MARQUEZ. P&S Docket No. 6546. Decided July 22, 1986.

William J. Weber, Administrative Law Judge.

Thomas Heinz, for complainant.

Pro se, for respondent.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF
DEFAULT, AS TO RESPONDENT GERARDO R. MARQUEZ

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stock-

yards Administration, United States Department of Agriculture, charging that the respondents violated the Act.

Copies of the Complaint and Notice of Hearing and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were personally served on the respondents. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Lourdes G. Marquez and Gerardo R. Marquez, a/k/a Lalo Marquez, hereinafter "respondents", are individuals with a mailing address at 7102 North 43rd Avenue, # 417, Glendale, Arizona 85301.

(b) Respondents, at all times material herein, were:

(1) Doing business as Boone Packing Co.,

(2) Engaged in the business of buying livestock in commerce for purposes of slaughter and manufacturing or preparing meats or meat food products for sale or shipment in commerce; and

(3) Packers within the meaning of and subject to the Act.

2. (a) Respondents, in the transactions set forth in paragraphs II and III of the Complaint and Notice of Hearing, purchased livestock for purposes of slaughter and failed to pay, when due, the full purchase price of such livestock.

(b) As of December 31, 1984, there remained unpaid by respondents \$59,495.41 for such livestock purchases.

3. Respondents, in connection with their operations as packers, on or about August 8, 1984, issued a check in the amount of \$28,292.80 to Demsey-Jamison, Inc., Peoria, Illinois, in purported payment for livestock which was returned unpaid by the bank upon which it was drawn because respondents did not have sufficient funds available in the account upon which such check was drawn to pay such check when presented.

4. Respondents, in connection with their operations as packers, have failed to create, keep and maintain accounts, records and memoranda which fully and correctly disclose their transactions

subject to the Act, in that respondents have failed to create, keep and maintain a general ledger, an accounts receivable ledger, a cash receipts and cash disbursements journal, a sales journal and copies of all purchase and sale invoices.

CONCLUSIONS

By reason of the facts found in Findings of Fact 2 and 3 herein, respondents have violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).

By reason of the facts found in Finding of Fact 4 herein, respondents have violated section 401 of the Act (7 U.S.C. § 221).

ORDER

Respondents Lourdes G. Marquez and Gerado R. Marquez, directly or through any corporate or other device, in connection with any business or operation as a packer, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock;
2. Failing to pay the full purchase price of livestock; and
3. Issuing checks in payment for livestock without having sufficient funds on deposit and available to pay such checks when presented.

Respondents shall create, keep and maintain accounts, records and memoranda which fully and correctly disclose their business transactions subject to the Act, including but not limited to: (1) a general ledger; (2) an accounts receivable ledger; (3) a cash receipts and cash disbursements journal; (4) a sales journal; and (5) copies of all sale and purchase invoices.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order became final on September 9, 1986.—Ed.]

In re: BOBBY M. HACKER. P&S Docket No. 6658. Decided September 18, 1986.

William J. Weber, Administrative Law Judge.
Jory Hochberg, for complainant.
Pro se, for respondent

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Bobby M. Hacker, doing business as Hacker Cattle Co., hereinafter referred to as the respondent, is an individual whose business mailing address is 1010 Ridgewood Drive, Valdosta, Georgia 31601.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Hacker, his agents, employees and assigns, directly or indirectly through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding

is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars (\$500.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: DOUG WELCH d/b/a W.W. GARRY, MICHAEL BENSON, MARLOWE K. BENSON, WAGNER-HUDSON LIVESTOCK MARKETING AGENCY, INC., ROGER D. KOCH CORPORATION d/b/a SWITZER WAGNER & Co., AND SWITZER-BAR 10, and ROGER D. KOCH. P&S Docket No. 6537. Decided September 25, 1986.

Fraudulent business practices in purchase/sale of livestock—Suspension—Civil Penalties—consent.

In *In re Welch*, P&S Docket No. 6537 (decision as to Michael Benson), decided by the Judicial Officer on September 25, 1986 (38 pages), the Judicial Officer affirmed Judge Weber's order barring respondent Benson from engaging in business subject to the Act for 1 year and assessing a \$10,000 civil penalty. The Judicial Officer amended the order, however, to require payment of the civil penalty in equal payments each month over a 3-year period, rather than at the end of 2 years. The Judicial Officer affirmed the cease and desist order requiring Benson to cease and desist from engaging in practices that would operate as a fraud or deceit upon any person in connection with the purchase or sale of that person's livestock; cooperating in any arrangement with a livestock selling agency in (i) purchasing consigned livestock at less than fair market value, (ii) enabling the selling agency to operate as a fraud or deceit upon consignors to the selling agency, or (iii) sharing in the profits derived from the resale of livestock purchased from consignments to such selling agency; or cooperating with any market agency buying livestock on a commission basis or its employees or agents in engaging in any act or practice which operates as a fraud or deceit upon the market agency or its principals. Benson, a hog salesman for commission firms operating at a terminal stockyard, violated §§ 307 and 312(a) of the Act by splitting the profits made by a dealer (Welch) buying livestock from Benson's commission firm or selling livestock to Benson's commission firm and in transactions where Benson transferred purchase orders received by Benson's employer to Welch to fill. Proof by a preponderance of the evidence is all that is required. The ALJ's determination as to the veracity of the witnesses is controlling. Such profit-

sharing is particularly odious at a terminal stockyard where intentional. The sanction imposed here is not nearly as severe as numerous sanctions that have been issued in recent years under the P&S Act (numerous cases cited).

Decision by Donald Campbell, Judicial Officer.

Allan Kahan, for complainant.

Timothy Shuminsky, Sioux City, IA., for respondents.

William J. Weber, Administrative Law Judge.

DECISION AND ORDER AS TO MICHAEL BENSON

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*)* An initial Decision and Order was filed on June 17, 1986, by Administrative Law Judge William J. Weber (ALJ) barring respondent Michael Benson from engaging in business subject to the Act for 1 year, assessing a \$10,000 civil penalty payable within 2 years, and ordering respondent Michael Benson to cease and desist from engaging in practices that would operate as a fraud or deceit upon any person in connection with the purchase or sale of that person's livestock; cooperating in any arrangement with a livestock selling agency in (i) purchasing consigned livestock at less than fair market value, (ii) enabling the selling agency to operate as a fraud or deceit upon consignors to the selling agency, or (iii) sharing in the profits derived from the resale of livestock purchased from consignments to such selling agency; or cooperating with any market agency buying livestock on a commission basis or its employees or agents in engaging in any act or practice which operates as a fraud or deceit upon the market agency or its principals.

On July 17, 1986, complainant, seeking to have the civil penalty payable upon the effective date of the decision, appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** On the same date, respondent, seeking to set aside the Decision and Order, also appealed to the Judicial Offi-

* See generally Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and Aug. 1985 Supp.), and Carter, *Packers and Stockyards Act*, in 10 Harl, *Agricultural Law*, ch. 71 (1980).

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program (December 1962-January 1971)).

cer. On September 9, 1986, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record, the ALJ's findings and conclusions are adopted as the final decision in this case, with changes too minor to itemize (except that the last sentence of Finding B(1)(2), which follows the sentence containing note 4, was added by the Judicial Officer). Additional conclusions by the Judicial Officer follow the ALJ's conclusions. The order is amended to require payment of the civil penalty in equal payments each month over a 3-year period.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

The complainant charges Doug Welch and Michael Benson (and others who may bear legal responsibility) with conspiratorial, unfair, and deceptive trade practices to defraud consignors and others in a series of transactions in violation of the Packers and Stockyards Act 1921, 7 USC 181 (Act), and the related regulations, 9 CFR 201.1.

Respondents denied any violation of the law or regulations.

At the time of trial, respondent Doug Welch d/b/a W. W. Garry (Welch), agreed to the entry of a Consent Decision and Order providing for six (6) months suspension, and a ten thousand dollar (\$10,000.00) civil penalty and a cease and desist order.

Earlier, Roger D. Koch, an individual, and Roger D. Koch Corporation d/b/a Switzer Wagner and Company, and Switzer-Bar 10 (Switzer Wagner, Switzer-Bar 10), agreed to the entry of a Consent Decision providing for a cease and desist order.

An agreement was reached between counsel concerning a cease and desist order with respect to respondent Marlowe K. Benson and Wagner-Hudson Livestock Marketing Agency, Inc. (Wagner-Hudson), but it has not yet been implemented. (TR p.8)

Trial of the issues was held on December 10, 11, and 12, 1985, with respect to the remaining respondent, Michael Benson. The last brief was filed April 17, 1986.

* * * * *

A. (1) On nine transactions ¹ between July 15 and November 17, 1983, respondent Michael Benson in the course of his employment with respondent Wagner-Hudson, in private treaty transactions, sold consigned livestock to respondent Welch at substantially less than full market value of the livestock.

Purchase Date (1983)	No Head	Resale Date (1983)	Resold to/at	Prof- it
July 15	4	July 15	Sioux City Livestock	\$110.00
Aug. 8	33	Aug. 8	Iowa Stock Pig Co.	\$306.05
Sept. 14 & 15	27	Sept. 15	Wagner-Hudson	\$87.26
Oct. 3	9	Oct. 3	Hayes Order Buyers Inc.	\$113.70
Oct. 6	7	Oct. 6	Hayes Order Buyers Inc.	\$128.25
Oct. 12	10	Oct. 12	Iowa Pig Co.	\$182.20
Nov. 17	17	Nov. 17	Hayes Order Buyers Inc.	\$147.70
Nov 17	5	Nov. 18	Wagner-Hudson	\$128.65

* * * * *

(2) These sales at substantially less than full market value enabled respondent Welch to immediately resell² the livestock at substantial price increases ranging up to 40%.

(3) Welch shared approximately one-half of the profits with Benson.

* * * * *

B. (1) In seven transactions,³ between February 20 and March 29, 1984, respondent Welch consigned hogs to Switzer Wagner. Respondent Michael Benson purchased those hogs to fill commission orders placed with his employer, Switzer Wagner.

Consignment and Sale Date (1984)	No. Head Con- signed	No. Head Pur- chased for Bar 10	Bar 10 Customer/Principal
Feb. 20	84	2	C & B Livestock
Mar. 15	38	14	C & B Livestock
Mar. 19	46	27	C & B Livestock
March 20-23	76	19	C & B Livestock
Mar. 26	66	17	C & B Livestock
Mar. 29	100	21	M & K Livestock

² In one instance hogs were held over and sold the following day.

(2) Respondent Benson paid unusually high prices, ranging from \$2.20 to \$4.30 per hundredweight (cwt) above the mode price ⁴ for the total lot of hogs. The resulting profit to Welch was split with respondent Michael Benson.

(3) Respondent Michael Benson did not tell his employer, nor the principals for whom the hogs were purchased, of his share in the profit from these transactions.

(4) Respondent Welch paid the usual commission to Switzer Wagner for the normal market services to sell these hogs.

(5) Respondent Michael Benson did not perform any unusual or extra services warranting or justifying any direct payment(s) by Welch to Benson.

* * * * *

C. (1) Respondent Michael Benson in his employment for Switzer-Bar 10 received orders to purchase hogs on a commission basis. Respondent Benson transferred these orders to respondent Welch to fill.⁵

⁵	Purchase Date (1984)	No. Head	Actual Pur- chase Price	Invoiced Pur- chase Price	Fraud- ulent Gain
	Mar. 13	29	\$1,697.85	\$2,073.76	\$360.40
	Mar. 15	23	\$1,673.87	\$1,900.39	\$211.60
	Mar. 19	42	\$2,765.90	\$3,061.33	\$272.30
	Mar. 20	23	\$1,620.70	\$1,969.21	\$334.22
	Mar. 22	59	\$4,301.90	\$4,702.87	\$365.74
	Mar. 26	17	\$1,373.60	\$1,550.86	\$165.71
	Mar. 29	49	\$3,872.75	\$4,124.91	\$221.82

(2) Respondent Welch purchased hogs to fill the orders and invoiced and collected from Switzer-Bar 10 at falsely increased prices.

(3) Respondent Welch charged Switzer-Bar 10 the usual buying commission for these purchases.

(4) Again, respondent Michael Benson shared with Welch about 50% of the profits from these transactions.

* * * * *

⁴ A mode price is the price paid the greatest number of times in the observed transactions.

D. (1) Between May 13, 1983 and April 16, 1984 Welch paid Benson \$15,015.37 in 20 checks (ranging from \$100 to \$2,819.22), as Benson's share of the profits.

* * * * *

E. (1) Doug Welch is engaged in the business of buying and selling livestock in commerce for his own account, as well as, buying livestock in commerce on a commission basis under the name of W. W. Garry, 208 Livestock Exchange Building, Sioux City Stockyards, Sioux City, Iowa 51107.

(2) He is registered with the Department of Agriculture as a dealer to buy and sell livestock for his own account, as well as, a market agency to buy livestock on a commission basis.

* * * * *

F. (1) Respondent Michael Benson at relevant times here was the Secretary/Treasurer of Wagner-Hudson Livestock Marketing Agency, Inc., Sioux City Stockyards, Sioux City, Iowa, until early January 1984. He was a hog salesman for respondent Wagner-Hudson.

(2) Thereafter, respondent Michael Benson was head hog salesman for Roger D. Koch Corporation d/b/a Switzer-Wagner and Company and Switzer-Bar 10.

(3) Respondent Michael Benson at all times material herein was engaged in the business of a market agency furnishing stockyard services and of a dealer buying or selling livestock in commerce as the agent or employee of the vendor or purchaser. [Respondent Benson's Answer]

* * * * *

Respondent Benson had a fiduciary responsibility to sell consigned hogs at the highest price available.

The evidence here indicates that Benson sold some hogs at unusually low prices and purchased other hogs at unusually high prices. This, by itself, is not necessarily illegal or unethical.

However, in these transactions, Benson dealt with Doug Welch. When Benson was buying from or selling to Welch the relationship should have been at arm's-length. The evidence here raises some questions whether they actually dealt at arm's-length.

Welch gave Benson some \$15,000.00 during this time. A 50% split of the profits is established by admissions of both Welch and Benson to the investigator, and the records themselves.

Thus, the record shows that Benson sold consigned hogs at less than full value, purchased hogs at unusually high prices, and received substantial payments from the favored party.

The transactions themselves are well documented and not disputed. Basically, Benson tried to explain away the incriminating \$15,000.00 as payments for "services" he rendered to Welch. This evidence lacks credibility and persuasiveness, is implausible and is somewhat contradictory. In fact, Welch admitted sharing profits with Benson and promised to stop, when interviewed by the investigator.

The clear preponderance of the evidence shows that Benson was paid by Welch for Benson's favored treatment.

This cheats consignors and purchasers of hogs, and erodes confidence in the people who operate the system and those who rely on the system. This erosion can become self-aggravating.

The division in profits established by the record is the keystone that locks both sides of the archway into a solid pattern of wrongdoing. It overrides any quibbling arguments about the degree of "highness" or "lowness" of the prices concerned.

The sharing of profits between supposedly competing interests (Benson and Welch, buyers and sellers, and vice versa) is the critical wrongdoing here.

When Benson bought at a high price and sold at a low price, in deals with Welch, it cheated his employers, those who consigned hogs to be sold by Benson, those who placed orders for Benson to fill on commission purchases, the industry and the public.

They trusted Benson to sell high and buy low, to the best of his ability, and market conditions. Benson appears to have failed this trust, to enhance Welch's profits and thereby his own secret share of these profits.

Benson engaged in willful, fraudulent, false and deceptive trade practices, careless disregard of duties under the Packers and Stockyards Act and regulations, in violation of sections 307 and 312(a) of the Act (7 USC 208, 213(a)).

Complainant seeks a \$10,000.00 civil penalty and an order preventing Benson from operating under the Act for one year.

The violations are serious, and cannot be tolerated. Efforts must be made to deter them. An appropriate sanction is required.

Great weight must be given to the complainant's recommended sanction. In *re Braxton Worsley*, 33 Agric. Dec. 1547, 1567 (1974); In *re Sy B. Gaiber and Co.*, 31 Agric. Dec. 843, 845-51, (1972); In *re J.A. Speight*, 33 Agric. Dec. 280, 310-19 (1974); In *re Samuel Espo-sito* 38 Agric. Dec. 613, 665 (1979).

The record shows a calculated course of conduct striking at the heart of the industry—integrity in the purchase and sale of live-stock by an agent/representative.

Binding precedents of the USDA Judicial Officer require the recommended sanction be imposed.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent Michael Benson contends on appeal that the ALJ's findings of fact are not adequately supported by the record, and that the sanction is unduly severe. However, there is no merit to either contention.

No useful purpose would be served by setting forth in full the record supporting the ALJ's findings of fact. The proof here far surpasses the preponderance of the evidence, which is all that is required.⁶ In addition, the record is relatively short and easy to understand. Furthermore, complainant's briefs, which should be included in the record on appeal, contain detailed citations to the evidence supporting the ALJ's findings of fact. Nonetheless, reference to some of the testimony and exhibits is set forth below to aid the reviewing court.

The checks issued to Michael Benson by Doug Welch were issued by Welch's company, *viz.*, W. W. Garry Co. (e.g., CX 1, p. 10). Doug Welch admitted that he split his profits on hogs with Michael Benson. Mr. Welch testified (Tr. 226):

Q. You are obviously familiar with the allegations contained in the Complaint. During the period set forth in the Complaint, 1983 and 1984, did you split profits on hogs with Mike Benson?

A. Yes.

Similarly, Michael Benson admitted to Philip O. Edwards, Supervisory Marketing Specialist in complainant's Omaha Regional Office, that the payments were for half the profits of Welch's W. W. Garry Company. Mr. Edwards testified (Tr. 80):

Q. Did your—did your conversation [with Michael Benson] talk about anything else?

⁶ See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

A. Oh, yes. I asked Mike the basis for—of percentage or how he got the money or what was the basis on the money. And he said he presumed it was on half the profits.

Q. What money were you talking about?

A. The checks that were issued to Mike Benson by W. W. Garry.

At the hearing, Michael Benson testified that he told complainant's investigator, Philip O. Edwards, that Doug Welch's payments were for extra work done by Benson for Welch (Tr. 321-23). But the ALJ, who saw and heard the witnesses testify, believed Edward's version of Benson's admission to Edwards. That is, the ALJ stated (Initial Decision at 11):

A 50% split of the profits is established by admissions of both Welch and Benson to the investigator, and the records themselves.

The ALJ's determination as to the veracity of the witnesses is controlling in the circumstances here. As stated in *Great Western Food Distributors v. Brannan*, 201 F.2d 476, 479-80 (7th Cir.), *cert. denied*, 345 U.S. 997 (1953), on appeal from a decision by USDA's Judicial Officer:

Often the "most telling part" of the evidence is not apparent from the printed page, "for on the issue of veracity the bearing and delivery of a witness will usually be the dominating factors". *N.L.R.B. v. Universal Camera Corp.*, 2 Cir., 190 F.2d 429, 430. Thus, "we may not disregard the superior advantages of the examiner who heard and saw the witnesses for determining their credibility, and so for ascertaining the truth." *Ohio Associated Tel. Co. v. N.L.R.B.*, 6 Cir., 192 F.2d 664, 668.

. . . In short, anyone who has observed witnesses on the stand will know that those "who see and hear witnesses are much better equipped to weigh the evidence and determine the credibility to be extended to those testifying than are the judges of courts of review who do not enjoy the same advantages." *Jennings v. Murphy*, 7 Cir., 194 F.2d 35, 36.

It would seem, then, that the function of this court is something other than that of mechanically reweighing the evidence to ascertain in which direction it preponderates; it is rather to review the record with the purpose of deter-

mining whether the finder of the fact was justified, i. e. acted reasonably, in concluding that the evidence, including the demeanor of the witnesses, the reasonable inferences drawn therefrom and other pertinent circumstances, supported his findings. To go further is to disregard the "most telling part" of the evidence. *N.L.R.B. v. Universal Camera Corp.*, supra. With this in mind we approach the proof offered in this proceeding.

Similarly, in *Cella v. United States*, 208 F.2d 783, 788 (7th Cir. 1953), cert. denied, 347 U.S. 1016 (1954), a case under the Packers and Stockyards Act, the court stated:

The hearing officer observed these witnesses upon the stand. He was the trier of the facts. The matter of their credibility was for him to decide. *Great Western Food Distributors V. Brannan*, 7 Cir., 201 F.2d 476, 479.

Finally, in *Fairbank v. Hardin*, 429 F.2d 264, 268 (9th Cir.), cert. denied, 400 U.S. 943 (1970), also under the Packers and Stockyards Act, the court stated:

When the trier of the facts, as here, expresses a doubt on the validity of oral testimony, the reviewing authority should not substitute its own judgment for that of the Examiner unless his findings are hopelessly incredible or flatly contradict either a "law of nature" or undisputed documentary evidence. *National Labor Relations Board v. Dinion Coil Co.*, 201 F.2d 484, 490 (2d Cir. 1952); see also *United States v. Oregon Medical Society*, 343 U.S. 326, 339, 72 S.Ct. 690, 96 L.Ed. 978 (1952).

In addition, Michael Benson's testimony at the hearing was vacillating and contradictory as to the payments from Welch. He testified at times that he did not expect to be paid by Welch, but at other times he testified that he did expect to be paid by Welch. He testified that the payments by Welch were for his physical labor rather than as a share of Welch's profits, but at other times he seemed to recognize that the payments must have been larger, at times, because Welch made more money on the hogs. Specifically, Michael Benson testified (Tr. 316-17, 320, 327, 332-34, 338, 342-47):

Q. Did you have an agreement as to how much he would pay you?

A. No.

Q. How often would he pay you?

A. There was no real time when he would pay me. He just would pay me. I never, you know, asked when are you going to pay me or anything. I just never—at first when we first did it?

Q. Yeah.

A. I didn't think I was going to get paid for it.

Q. Then he came up and gave you some money?

A. Yes.

Q. And what was your understanding that that money was for?

A. For the work I did. [Tr. 316-17].

* * * * *

Q. Did you expect to be paid for all this extra work [for Welch]?

A. Yes.

Q. And, of course, you got paid?

A. Yes. [Tr. 320].

* * * * *

Q. Did he [Welch] ever show you or tell you I marked these hogs up or I did this with these hogs or anything like that?

A. No.

Q. All you did was the physical labor for him?

A. That's right. Yes.

Q. And then he paid you for the physical labor?

A. Yes. [Tr. 327].

* * * * *

Q. Okay. Did Doug Welch ever come to you and say, here, I'm going to split these monies with you that I made off my transactions?

A. No.

Q. Did he just pay you a sum of money?

A. Yes.

Q. Did you ever ask him, say, how come you are paying me 1065 dollars this time—strike that. Let me get some exact figures. Did you ever ask him today you paid me 613 dollars and 13 cents, but last week—last month you paid me 397.39. Did you ever ask him why the difference?

A. No.

Q. Would it correspond that in the months that you received higher checks—like in August of '83 you received 1003 dollars and 71 cents versus in June receiving 613 dollars and 13 cents. Would there be a correlation or—you know what I mean by correlation?

A. Yeah.

Q. Would there be a correlation between the amount of work you did, the number of hogs that you had to work on versus the amount of money that you would get?

A. It would be the amount of hogs that I took care of or handled. Butchers you make more.

Q. The more hogs you took care of and handled, the more money that you would be receiving for the services rendered from Doug Welch and W. W. Garry?

A. Yes. [Tr. 332-34].

* * * * *

Q. . . . Did you ever know what profit he [Welch] made?

A. Never. [Tr. 338].

* * * * *

Q. So you did many of the same things for all your other customers—

A. Yes.

Q. —that you do for Mr. Welch?

A. Yes.

Q. How come you didn't get money from them?

A. From who?

Q. From the other customers that you were selling hogs.

A. I never asked them for anything. I just—I do not know why.

Q. The first time that Mr. Welch gave you a check, did you ask what's this for?

A. Yeah. I said what's this for.

Q. And what did he say?

A. For the work you are doing.

Q. And did you say, gee, it seems to be a lot of money?

A. Who said that? You said that.

Q. No, I'm asking you, did you say, oh, gee, seems to be a lot of money?

A. No. Somebody gives me a check, I don't ask what it's for.

Q. Even when that check is larger than your salary?

A. I won't—no, I won't ask—if somebody gives me a check, I won't ask what it's for.

Q. Even when it's two and a half times your weekly wages?

Mr. SHUMINSKY: I am going to object. That is not true.

Q. The check was—there was one check received—dated August 30th of 1,003 dollars; one check dated November 25th of 1055 dollars; and one check dated December 19th which was not two and a half times, but close to five times your salary, 2,2—

A. Per month or per week?

Q. No, per week. You got—

A. He didn't give me a check every week, did he?

Q. No. But that is—

A. Per month—what would it be per month? Would it be about—

Q. A thousand dollars per month.

A. Yeah. Be about the same for the work I was doing for him and anybody else.

* * * * *

Q. And you never asked no matter what the size of the check as to how he determined the amount?

A. No. I would say—I would just say to him the hogs must have been all right or something. He said, yeah. Yeah. If he said—and then he would give me the check, say thanks a lot. I would say thank you. I was—I was surprised they were that big. I mean I will—I was surprised it would be that big.

Q. And you never——

A. And I never expected a check from him anyway.

* * * * *

Q. What did you tie the amount of money that he gave you to because it was varying amounts?

A. Well, I figured it was probably for the work that I was doing for him. His hogs must have been making money, you know, must have been making good money, so he was paying me for it. You know, that's what I—you know, so that's what I figured it was for.

Q. How—what did you assess or what did you believe was the reason that sometimes you would get like 668 dollars and that sometimes you would get 1055 dollars?

A. Well, the hogs must have made more money. One set of hogs must have made more money and then there was more of them.

Q. More of them?

A. More of the hogs, and so he paid me more.

Q. There were a larger number of hogs?

A. Yes.

Q. When there were more hogs, what would be your compensation? Would it be smaller or lower?

A. Smaller or what?

Q. Okay. What was the correlation between the number of hogs that you worked during a month period and the size of the check that you received?

A. The more hogs I dealt with and handled, the more money I got. [Tr. 342-47].

In addition to the admissions by Doug Welch and Michael Benson, and the contradictory nature of Benson's testimony at the hearing, the fact that 14 of the 20 checks given to Michael Benson by Doug Welch were in uneven amounts further supports the conclusion that the payments represented a split of the profits, and that Michael Benson knew that the payments represented a split of Doug Welch's profits. The dates and the amounts of the checks are as follows (CX 24, p. 1):

Dates and Amounts of Checks Given by Welch to Benson

Date of Check	Amount of Check
May 13, 1983	\$250.00
May 26, 1983	397.39
June 20, 1983	613.13
July 1, 1983	432.13
July 19, 1983	520.07
Aug. 1, 1983	915.56
Aug. 30, 1983	1,003.71
Sept. 22, 1983	296.40
Oct. 7, 1983	100.00
Oct. 14, 1983	300.00
Oct. 25, 1983	668.50
Nov. 23, 1983	100.00
Nov. 25, 1983	1,055.88
Dec. 19, 1983	2,222.93
Dec. 30, 1983	305.74
Jan. 31, 1984	1,511.55
Mar. 5, 1984	903.16
Mar. 16, 1984	100.00
Mar. 28, 1984	2,319.22
Apr. 16, 1984	<u>1,000.00</u>
Total	15,015.37

After a first payment of \$250 in an even amount, Michael Benson received seven checks from Welch ending in 39¢, 13¢, 13¢, 7¢, 56¢, 71¢, and 40¢. Michael Benson would have to be incredibly naive not to recognize that these checks had to be computed on a percentage of Welch's profits.

The documentary evidence shows that the checks were, in the main, for exactly one-half of Welch's profits. For example, the documentary evidence shows that during the period July 5-15, 1983, Doug Welch made profits totalling \$1,040.15 on hogs involving Michael Benson (CX 1, p. 7). His check to Michael Benson on July 19, 1983, for \$520.07 represented exactly one-half of the profits ($\$1,040.15 \div 2 = \520.075).

The documentary evidence shows that from August 2-29, 1983, Doug Welch made profits totalling \$2,007.43 on hogs involving Michael Benson (CX 2, p. 6). Doug Welch's check dated August 30, 1983, to Michael Benson for \$1,003.71 represents exactly one-half of those profits ($\$2,007.43 \div 2 = \$1,003.715$).

The documentary evidence shows that from September 7-21, 1983, Doug Welch made profits totalling \$592.81 on hogs involving Michael Benson (CX 3, p. 7). Doug Welch's check to Michael Benson dated September 22, 1983, for \$296.40 represents exactly one-half of those profits ($\$592.81 \div 2 = \296.405).

The payment in even amounts of \$100 on October 7, 1983, and \$300 on October 14, 1983, appear, at first glance, to be contrary to the norm. However, a closer analysis reveals that the \$100 and \$300 checks represent cash advances to Benson (either requested by Benson or volunteered by Welch before the exact profits were computed and divided in half). That is, the documentary evidence shows that during the period September 23-October 21, 1983, Doug Welch's profits on hogs involving Michael Benson totalled \$2,137.02 (CX 4, p. 6). The checks for \$100 and \$300 dated October 7 and 14, 1983, combined with the check for \$668.50 dated October 25, 1983, total \$1,068.50, which is just 1¢ less than exactly half of Welch's profits for the period September 23-October 21, 1983 ($\$2,137.02 \div 2 = \$1,068.51$).

Large discrepancies in the 50% profit sharing appear in two of the checks. The documentary evidence shows that Doug Welch made profits totalling \$1,906.32 on hogs involving Michael Benson from February 9-March 2, 1984 (CX 11, p. 24). One-half of the profits would have equalled \$953.16. Instead of receiving that amount, Michael Benson received a check dated March 5, 1984, for \$903.16. (This \$50 discrepancy between \$953.16 and \$903.16 could have been a clerical error or a \$50 reduction for some unexplained reason.)

The largest discrepancy relates to the period from March 9-26, 1984, in which Doug Welch made profits totalling \$5,837.44 on hogs involving Michael Benson (CX 12, p. 20). During this period, Doug Welch gave Michael Benson a check for \$100 on March 16, 1984, and a check for \$2,319.22, on March 28, 1984, totalling \$2,419.22.

One-half of the profits during this period amounts to \$2,918.72 ($\$5,837.44 \div 2 = \$2,918.72$).

Even in the absence of any admissions by Welch and Benson, the documentary evidence would have led me to conclude that Doug Welch was giving Michael Benson approximately half of his profits on hogs, and I would have inferred from the documentary evidence that Michael Benson knew that he was receiving about half of Doug Welch's profits. But, in view of the admissions set forth above, there is no need to rely on the documentary evidence and inferences in this respect.

Griffen E. Bonham, Chief, Marketing Practices Branch, Livestock Marketing Division, Packers and Stockyards Administration, USDA, testified that respondent Michael Benson's conduct was unfair and deceptive, and that it is considered as a very serious violation of the Packers and Stockyards Act for a commission firm salesman to enter into the type of arrangement that Michael Benson had with Doug Welch (Tr. 355-89). Any type of arrangement involving the sharing of profits between an order buyer or dealer doing business at a terminal stockyard and a commission seller at the stockyard is an unfair, unjust and deceptive practice in violation of the Act (7 U.S.C. §§ 208, 213(a)). Such profit sharing is particularly odious at a terminal stockyard where livestock is sold by private treaty (as distinguished from auction), in view of the nature of private treaty selling. Private treaty selling at a terminal stockyard (such as the Sioux City stockyard involved here) is described in Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, *Agricultural Law* 228-29 (1981), as follows (quoting from one of the author's prior decisions):

In a private treaty sale, the prospective purchasers gather at the head of a commission firm's alley. Prior to the sale, the commission firm sorts each consignment into uniform lots, which are placed in separate pens. A good commission firm salesman knows what types of livestock are needed by particular buyers, and he has an opportunity to visit with the buyers before the sale begins. The salesman selects the buyer whom he believes to be the best buyer for a particular lot of livestock and takes that buyer into the pen (or pens) and negotiates in secret with him as to the price. No buyer knows exactly what the other potential buyers will bid. Thus, each buyer entering the pens must bid as high as he believes is necessary to purchase the livestock. At a private treaty sale, there is haggling over the price between the buyer and the seller. If they agree on a price,

the sale is consummated. If not, the salesman takes another buyer into the pen and negotiates secretly with him as to the price. The salesman's offering price to the subsequent buyers may be higher or lower than the price involved in the negotiations with the previous buyers. Where a commission salesman has no good basis for selecting one buyer over another, on occasion he will flip a coin to determine the order in which the purchasers will have an opportunity to negotiate for livestock in a particular pen or alley.

In a private treaty sale, if the livestock are sold to the first buyer who is taken into the pen, the other buyers do not have an opportunity to bid on the livestock. But all buyers had the opportunity to make known to the salesman their particular buying needs that day and, therefore, they all had an opportunity to try to influence the seller into selecting them as the first potential purchaser. (Footnote omitted.)

In the present case, the record supports the ALJ's finding that in a number of private treaty transactions, Michael Benson, in the course of his employment as a commission firm salesman, "sold consigned livestock to respondent Welch at substantially less than full market value of the livestock" (Initial Decision at 3). That violated one of the main objectives of the Act, which "is to safeguard farmers and ranchers against receiving less than the true market value of their livestock" (H.R. Rep. No. 1048, 85th Cong., 1st Sess. 1 (1957), reprinted in [1958] U.S. Code Cong. & Ad. News 5212, 5213. See *Glover Livestock Comm'n Co. v. Hardin*, 454 F.2d 109, 113 (8th Cir. 1972), rev'd on other grounds, 411 U.S. 182 (1973); *Bruhn's Freezer Meats of Chicago, Inc. v. U.S.D.A.*, 438 F.2d 1332, 1337-38 (8th Cir. 1971).

Even if there had been no proof that Benson sold consigned livestock to Welch at less than the full market value, or purchased livestock consigned by Welch at more than the full market value (to fill Benson's employer's purchase orders), the mere fact that there was a transfer of funds from Welch to Benson in connection with transactions at the stockyard placed Benson in a conflict-of-interest situation, which is a very serious violation of the Act. As stated in *Midwest Farmers, Inc. v. United States*, 64 F. Supp. 91, 95, 102 (D. Minn. 1945) (3-judge court):

The producer consigns his livestock to a market agency to represent him as his agent and who is supposed to have no interest except the welfare of his principal. Accordingly

the producer places his financial interests in the absolute control of his agent. Consequently, the success of the livestock producing industry of the country in a large measure depends on the business practices of the stockyard agencies that sell livestock of great value. To say that much depends on the integrity and ethics of those engaged in marketing livestock is speaking mildly. Experience long ago taught that stockyards require some sort of supervision and Congress has lodged it in the Department of Agriculture under the Act of 1921, as amended, obviously because a major portion of the great agricultural industry of the country is vitally concerned.

* * * * *

The methods of transacting business in the yards constantly are a temptation to collusion. Sales of livestock are made by negotiation and bargaining, and not at public auction. The purchaser is present; the shipper is not, but relies on his market agency. The agent is in closest contact with buyers for packers, with speculators and traders and perhaps has dealt with these same persons for many years; so, in accordance with human instincts, ways and means are found to profit at the expense of the absent member to the transaction. A marketing agency should maintain a position at all times which would assure absolute loyalty to its shippers. No interest should be allowed to interfere between the agent and his principal. When an agency receives a consignment of livestock, the sole objective should be to sell it at the highest price obtainable on an open, competitive market. When the agency acquires an interest, other than agent, it no longer can honestly and efficiently represent the principal.

A commission firm employee is in a fiduciary relationship to the firm's principals, and owes the highest degree of loyalty to the firm's principals.⁷ Respondent Michael Benson engaged in a very serious violation by entering into an arrangement with Doug

⁷ *Midwest Farmers, Inc. v. United States*, 64 F. Supp. 91, 94-102 (D. Minn. 1945) (3-judge court); *In re Saylor*, 44 Agric. Dec. —, slip op. at 185 (Sept. 20, 1985) (decision on remand), *In re Bosma*, 41 Agric. Dec. 1742, 1744, 1751-54 (1982), *aff'd in part & rev'd in part*, 754 F.2d 804 (9th Cir. 1984); *In re Sterling Colo. Beef Co.*, 39 Agric. Dec. 184, 211-12 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 829 (1979).

Welch that necessarily and inherently created a conflict-of-interest situation.

It would have been highly improper for Michael Benson to have received even small payments from Doug Welch, in view of their relationship. But here the payments from Welch to Benson exceeded \$15,000 in a period of just over 11 months. That was almost as much as Benson's yearly salary (Tr. 268-70, 379-80)! If Benson's salary was not adequate payment for the work he did on behalf of all consignors, including those instances in which Doug Welch was the consignor, the remedy was to obtain more pay from his employer—not to secretly obtain \$15,000 from Welch. (Michael Benson admits that he never told anyone (other than the Internal Revenue Service (Tr. 271)) about Welch's payments to him (Tr. 334-35)).

Although respondent should have known that it was highly improper for him to secretly accept over \$15,000 from Doug Welch, even if we assume that he did not (which requires the assumption that he lacks any sense of business morality), his conduct was, nonetheless, willful, within the meaning of the Administrative Procedure Act (5 U.S.C. § 558(c)). As stated in *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961):

We think it clear that if a person 1) intentionally does an act which is prohibited,—irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements, the violation is wilful. *Eastern Produce Co. v. Benson*, 3 Cir., 278 F.2d 606, 609.

Similarly, in *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960), the court stated:

Nor can we subscribe to the proposition that the test of willfulness in this context is to be evil purpose or criminal intent, for this is not a criminal statute.

In *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 186-87 (1973), the Court stated with respect to the Packers and Stockyards Act:

The Secretary may suspend "for a reasonable specified period" any registrant who has violated any provision of the Act. 7 U.S.C. § 204. Nothing whatever in that provision confines its application to cases of "intentional and flagrant conduct" or denies its application in cases of negligent or careless violations. Rather, the breadth of the grant of authority to impose the sanction strongly implies a congressional purpose to permit the Secretary to impose

it to deter repeated violations of the Act, whether intentional or negligent.

Accord *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 778 (1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981); *In re Shatkin*, 34 Agric. Dec. 296, 297-314 (1975).⁸

It is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents, but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings in recent years.

The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Saylor*, 44 Agric. Dec. 2238, slip op. at 498-520 (Sept. 20, 1985) (decision on remand),⁹ which is set forth as an appendix to this decision.¹⁰

⁸ The definition of willful in *TWA v. Thurston*, 105 S. Ct. 613, 624-26 (1985), is based on the legislative history of the Age Discrimination Employment Act, which is quite different from the legislative history of the term willful under the Administrative Procedure Act. Accordingly, the Court's holding in *Thurston* as to the meaning of "willful" is not appropriate for use in our Department's disciplinary proceedings.

⁹ The Department's severe sanction policy did not originate with *Saylor*, but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner*, 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed in numerous other decisions before it was finalized in *In re Miller*, 33 Agric. Dec. 53, 64-80 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974). Slight revisions (mostly editorial) were made in *Saylor*.

¹⁰ Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, in *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1976); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric.

In view of respondent Michael Benson's serious violations of the Packers and Stockyards Act occurring over an extensive period of time, the sanction recommended by complainant is fully justified. Respondent argues "that the greatest punishment and penalties goes to the person who has the audacity to require P & S to hold a hearing" (Appeal Petition at 4). However, respondent has not been given an *increased* sanction because he went to a hearing—he merely was not afforded the opportunity to accept a *decreased* sanction that was given to the other parties, including Doug Welch, who consented to the issuance of a decision and order without a hearing. Doug Welch consented to a \$10,000 civil penalty and a 6-month suspension order, which is the identical sanction that was offered to respondent Michael Benson on a consent basis (Tr. 382).

Many criminals who engage in plea bargaining are punished less than others who go to trial. Similarly, in appropriate circumstances, the Packers and Stockyards Administration offers a *reduced* sanction to a respondent who consents to a decision and order, without a hearing. There are sound administrative reasons for that practice. In the first place, a consent order is effective much sooner than in the case of a litigated order. This aids in deterring others from violating the Act.

Second, consent decisions conserve the Department's limited money and manpower.

Third, a consent decision eliminates the uncertainty that may develop at a hearing. It is not unusual for trade witnesses who give sworn statements during the investigation favorable to complainant's case to change their story on the witness stand. Moreover, it is not unheard of for respondents in administrative cases to offer perjured testimony in support of their defense. In a recent Packers and Stockyards Act case, *In re Saylor*, 41 Agric. Dec. 2187 (1982), *remanded*, 723 F.2d 581 (7th Cir. 1983), *final decision*, 44 Agric. Dec. 2238 (Sept. 20, 1985), Saylor arbitrarily raised the weights of cattle he purchased for customers in 14 transactions, and invoiced them at falsely increased weights. However, Saylor created a phony set of worksheets and scale tickets purporting to show that he substituted a few heavier cattle for light cattle, which accounted for the increases in weights. His false worksheets and scale ticket and perjured testimony were so convincing that, in the absence of a detailed exposition, the court remanded the proceeding, admonishing the Department to "carefully examine the record in this case

Dec. 499, 515, 539-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

and to give clear and cogent reasons for whatever result it reaches on remand" (723 F.2d at 584).

On remand, Saylor filed four briefs relying on the falsely created documents and perjured testimony. However, after the Judicial Officer took the time and effort required to write a 529-page decision, which included copies of the documentary evidence (328 numbered arrows were added by the Judicial Officer to the documentary evidence to facilitate the explanations), and set forth 173 circumstances that proved conclusively (beyond the possibility of any doubt) that Saylor invoiced customers on the basis of falsely increased weights, Saylor did not even file a petition for reconsideration with the Judicial Officer. He acquiesced in the \$10,000 civil penalty and 8-month suspension order without appealing again to the court of appeals.

Since the complainant can never be sure what type of proof will be offered at a hearing, there is a sound basis for decreasing the appropriate sanction in particular cases in order to obtain a consent settlement.

The \$10,000 civil penalty and 1-year sanction requested by complainant here is not out of line with numerous severe sanctions that have been issued in recent years under the Packers and Stockyards Act, e.g., *In re Garver*, 45 Agric. Dec. ____ (June 19, 1986) (2-year suspension); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. ____ (May 8, 1986) (\$50,000 civil penalty), *appeal docketed*, No. 86-7332 (9th Cir. June 6, 1986); *In re Corn State Meat Co.*, 45 Agric. Dec. ____ (May 8, 1986) (\$50,000 civil penalty); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. ____ (Mar. 7, 1986) (6-month suspension), *appeal docketed*, No. 86-7198 (9th Cir. Apr. 16, 1986); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. ____ (Feb. 27, 1986) (decision as to Millsbaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year); *In re Saylor*, 44 Agric. Dec. 2238 (Sept. 20, 1985) (decision on remand) (8-month suspension and \$10,000 civil penalty); *In re ITT Continental Baking Co.*, 44 Agric. Dec. ____ (Mar. 18, 1985), *final consent decision*, 44 Agric. Dec. ____ (Oct. 24, 1985) (\$10,000 civil penalty); *In re Mid-West Veal Distributors*, 43 Agric. Dec. ____ (July 13, 1984) (\$77,000 civil penalty, with \$27,000 suspended); *In re Mayer*, 43 Agric. Dec. ____ (Apr. 12, 1984) (decision as to Doss) (2-year suspension), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Peterman*, 42 Agric. Dec. ____ (Dec. 12, 1983), *aff'd*, 770 F.2d 888 (10th Cir. 1985) (\$20,000 civil penalty).

In *In re Garver*, 45 Agric. Dec. ____, slip op. at 17-21 (June 19, 1986), it is explained that 2-to-5-year suspension orders are now issued in the case of serious failures to pay for livestock where 30-

to-60-day suspension orders would have been issued in comparable cases a few years ago.

In assessing a civil penalty, the Act requires consideration of the "gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business" (7 U.S.C. § 213(b)). Since respondent Michael Benson is not the owner of a business, the "gravity of the offense" should largely determine the civil penalty here. But, inasmuch as respondent Michael Benson's earning ability is limited (Tr. 268-70, 379-80), the \$10,000 civil penalty should be payable in equal monthly installments over a 3-year period.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent Michael Benson, his agents and employees, directly or indirectly, through any corporate or other device, shall cease and desist from:

1. Engaging in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale, on a commission basis or otherwise, of that person's livestock;

2. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency selling livestock on a commission basis, or any employee or agent of such market agency, for the purpose of purchasing consigned livestock at less than its fair or true market value;

3. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding, or course of business with any market agency selling livestock on a commission basis, or any employee or agent of such market agency, which would enable such market agency, employee or agent to engage in any act or practice which operates or would operate as a fraud or deceit upon the consignors of livestock to such market agency;

4. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency selling livestock on a commission basis, or any employee or agent of such market agency, to split or otherwise share in any profits derived from the resale of livestock purchased from consignments to such market agency; and

5. Entering into, continuing in, or cooperating in any arrangement, agreement, understanding or course of business with any market agency buying livestock on a commission basis, or any employee or agent of such market agency, which would enable such market agency, employee or agent to engage in any act or practice

which operates or would operate as a fraud or deceit upon the market agency or its customers or principals.

Respondent Michael Benson is found to be unfit to engage in business subject to the Packers and Stockyards Act and shall not engage in business or operate subject to the Act as a market agency, buying and selling livestock in commerce on a commission basis or furnishing stockyard services, or as a dealer, buying and selling livestock in commerce, either on his own account or as the employee or agent of the vendor or purchaser, for a period of 1 year.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent Michael Benson is assessed a civil penalty in the amount of \$10,000, to be paid over a 3-year period (35 monthly payments of \$277.78, and the last monthly payment of \$277.70), with the first monthly payment due on December 1, 1986, and each payment thereafter due on the first day of the applicable month. The civil penalty is to be paid by checks made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Packers and Stockyards Division, Office of the General Counsel, Room 2446-South, United States Department of Agriculture, Washington, D.C. 20250-1400. If complainant advises respondent that any check was returned unpaid because of insufficient funds or any other reason, all future monthly payments shall be by certified checks.

The cease and desist provisions of this order shall become effective on the day after service of this order. The 1-year prohibition shall become effective on the 60th day after service of this order.

APPENDIX

Excerpt from *In re Saylor*, 44 Agric. Dec. 2238 slip op. at 498-520 (Sept. 20, 1985) (decision on remand).

U.S.D.A. SANCTION POLICY

[Excerpt omitted.—Ed.]

re: RICHARD N. GARVER. P&S Docket No. 6449. Order issued September 29, 1986.

In A. Campbell, Administrative Law Judge.
Ter Train, for complainant.
Thomas Smith, Cincinnati, Ohio, for respondent.

ORDER DENYING PETITION FOR RECONSIDERATION

On August 15, 1986, respondent filed a petition for reconsideration challenging Finding of Fact 11 and arguing that a severe sanction is inappropriate and would have no deterrent effect on respondent or others.

Finding 11, which relates to respondent's sale of property used as security by the bank for its line of credit, and the bank's termination of the line of credit, is fully supported by the record. Moreover, it makes no difference why the bank terminated its line of credit. As stated in the original decision herein, note 2, the "bank's action in withdrawing respondent's line of credit did not cause his loss of at least \$700,000 [which is the actual cause of respondent's failure to pay], but merely exposed his insolvent condition."

As to the appropriateness of the sanction, respondent argues that a severe sanction should only be imposed in nonpayment cases where the nonpayment occurred because of fraud. Respondent's argument would, however, emasculate the 1976 payment provisions enacted by Congress. The Act was amended in 1976 to provide (7 U.S.C. § 228b):

§ 228b. *Prompt payment for purchase of livestock*

(a) *Full amount of purchase price required; methods of payment*

Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price: *Provided*, That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer of possession thereof, actually deliver at the point of transfer of possession to the seller or his duly authorized representative a check or shall wire transfer funds to the seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or "grade and yield" basis, the purchaser shall make payment by check at the

point of transfer of possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price: *Provided further*, That if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment.

(b) Waiver of prompt payment by written agreement; disclosure requirements

Notwithstanding the provisions of subsection (a) of this section and subject to such terms and conditions as the Secretary may prescribe, the parties to the purchase and sale of livestock may expressly agree in writing, before such purchase or sale, to effect payment in a manner other than that required in subsection (a) of this section. Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction.

(c) Delay in payment or attempt to delay deemed unfair practice

Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this chapter. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this chapter.

The 1976 payment amendment does not use the term fraud or any synonym thereof. Congress was not concerned merely with fraudulent failures to pay. Congress was concerned with all failures to pay (see the legislative history quoted in the original decision herein at 18). The 1976 payment amendment was enacted because livestock buyers (primarily packers) failed to pay for substantial amounts of livestock. See *In re Beef Nebraska, Inc.*, 44 Agric. Dec.

— (Nov. 26, 1985), *appeal docketed*, No. 85-2534 (8th Cir. Dec. 31, 1985). As stated in the House Report on the 1976 amendatory legislation (H.R. Rep. No. 1043, 94th Cong., 2d Sess. 5 (Apr. 14, 1976)):

Between 1958 and early 1975 167 packers failed, leaving livestock producers unpaid for over \$43 million worth of livestock. By far the largest of such failures was that of American Beef Packers (ABP), which went bankrupt in January, 1975, leaving producers in 13 states unpaid for a total of over \$20 million in livestock sales.

The average loss to livestock sellers as a result of each packer failure from 1958 through early 1975 was \$257,485.02 ($\$43,000,000 \div 167 = \$257,485.02$). If we omit the one \$20 million failure of American Beef Packers, the average loss to livestock sellers from each packer failure from 1958 through early 1975 was \$138,554.21 ($\$23,000,000 \div 166 = \$138,554.21$). In contrast, respondent Garver's financial failure caused livestock sellers to lose about \$700,000, or more than five times the average loss caused by packer failures, excluding American Beef ($\$700,000 \div \$138,554.21 = 5.05$).

Accordingly, respondent Garver's violations are extremely serious, warranting a very severe sanction under the Department's sanction policy, set forth in the original decision herein. The 2-year suspension order issued in this case is not out of line with numerous severe sanctions that have been issued in recent years under the Packers and Stockyards Act, *e.g.*, *In re Welch*, 45 Agric. Dec. ____ (Sept. 25, 1986) (decision as to Michael Benson) (1-year suspension from engaging in business subject to Act and \$10,000 civil penalty); *In re Holiday Food Service, Inc.*, 45 Agric. Dec. ____ (May 8, 1986) (\$50,000 civil penalty), *appeal docketed*, No. 86-7332 (9th Cir. June 6, 1986); *In re Corn State Meat Co.*, 45 Agric. Dec. ____ (May 8, 1986) (\$50,000 civil penalty); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. ____ (Mar. 7, 1986) (6-month suspension), *appeal docketed*, No. 86-7198 (9th Cir. Apr. 16, 1986); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. ____ (Feb. 27, 1986) (decision as to Millspaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year); *In re Saylor*, 44 Agric. Dec. 2238 (Sept. 20, 1985) (decision on remand) (8-month suspension and \$10,000 civil penalty); *In re ITT Continental Baking Co.*, 44 Agric. Dec. ____ (Mar. 18, 1985), *final consent decision*, 44 Agric. Dec. ____ (Oct. 24, 1985) (\$10,000 civil penalty); *In re Mid-West Veal Distributors*, 43 Agric. Dec. ____ (July 13, 1984) (\$77,000 civil penalty, with \$27,000 suspended); *In re Mayer*, 43 Agric. Dec. ____ (Apr. 12, 1984) (decision as to Doss) (2-year suspension), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re*

Peterman, 42 Agric. Dec. ____ (Dec. 12, 1983), *aff'd*, 770 F.2d 888 (10th Cir. 1985) (\$20,000 civil penalty).

If respondent's payment violations had resulted from fraud, a much more severe sanction would have been appropriate.

Respondent argues that there is no deterrent value to a severe sanction where a person merely cannot pay his bills. However, that same argument was rejected in a case under the Perishable Agricultural Commodities Act, *In re Foursome Brokerage, Inc.*, 42 Agric. Dec. ____, slip op. at 19-20 (Dec. 5, 1983), *aff'd per curiam*, 747 F.2d 1463 (5th Cir. 1984) (unpublished), in which the Judicial Officer stated:

A number of respondent's creditors expressed the view that a sanction imposed on respondent would not have any deterrent effect on respondent or others in the industry. Judge Palmer also expressed the view (Tr. 268) that severe sanctions have no effect in deterring payment violations since—

People don't pay their bills, because they don't have the money, and I don't care what you do in any of these cases. That is not going to change one thing.

That view overlooks the fact that a person who fears a severe sanction if he violates the payment provisions of the Act can take steps to minimize the likelihood of payment violations. For example, he can obtain adequate capitalization before starting in business. (The record in this case suggests that respondent was undercapitalized.) He can also refrain from knowingly selling to risky purchasers, who frequently pay a little more than other purchasers, if they pay at all, but who cause serious problems if they fail to pay. In addition, he can avoid letting one firm get too deeply in debt to him and carefully monitor the payment practices of all his debtors.

Adequate clerical staff can also be employed to assure prompt attention to the paperwork involved in produce transactions. (The record here suggests that respondent, at times, had inadequate clerical staff to handle the heavy volume of paperwork.) Where more than one person is involved in buying produce for a firm, reporting and review procedures can be utilized to catch potential problems in their incipency. (The record here suggests that Mr. Patlan was permitted to freewheel without supervision or review.)

The records I have reviewed in about 40 payment violation cases have convinced me that there are many steps that can be taken to minimize the likelihood of payment violations. Accordingly, severe sanctions imposed on payment violators should have a significant deterrent effect in the produce industry. *In re Worsley*, 33 Agric. Dec. 1547, 1558-67 (1974).

The same reasoning is applicable to the livestock industry. Furthermore, as stated in the original decision herein (slip op. at 17), violations involving fraud normally deprive a livestock seller of only about 1% of the value of his livestock, whereas a failure to pay deprives the livestock seller of 100% of the value of his livestock. Accordingly, failure to pay violations, whether resulting from fraud or not, warrant a very severe sanction.

For the foregoing reasons, respondent's petition for reconsideration should be denied.

ORDER

Respondent's Petition for Reconsideration is denied.

In re: BARREN RIVER DAIRY SALES, INC., SHIRLEY McCORKLE and HARLAN WARD. P&S Docket No. 6731. Decided September 29, 1986.

Victor Palmer, Administrative Law Judge.

Thomas Heinz, for complainant.

Pro se, for respondents.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Barren River Dairy Sales, Inc., is a corporation with a business mailing address at P.O. Box 259 D, Glasgow, Kentucky 42141.

2. Respondent Barren River Dairy Sales, Inc., is, and at all times material herein was, engaged in the business of buying and selling livestock in commerce for its own account and for the account of others and buying livestock in commerce on a commission basis.

3. Respondent Shirley McCorkle is an individual with a mailing address at Route 1, Magnolia, Kentucky 42757.

4. Respondent Shirley McCorkle is, and at all times material herein was, the ostensible sole owner, manager, director and controller of respondent Barren River Dairy Sales, Inc.

5. Respondent Harlan Ward, is an individual with a mailing address at Route 1, Glasgow, Kentucky 42141.

6. Respondent Harlan Ward is, and at all times material herein was:

(a) The actual owner, manager, director and controller of respondent Barren River Dairy Sales, Inc; and

(b) Registered with the Secretary of Agriculture as a partner in three separate partnerships engaged in livestock businesses. Such registrations are currently inactive.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Barren River Dairy Sales, Inc., its officers, directors, agents, employees, successors and assigns, and respondents Shirley McCorkle and Harlan Ward, their agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent Harlan Ward is suspended as a registrant under the Act, and respondents Barren River Livestock Dairy Sales, Inc., and Shirley McCorkle are prohibited from operating subject to the Act, until they comply fully with the bonding requirements under the

Act and the regulations. When respondents demonstrate that they are in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension and prohibition.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents are jointly and severally assessed a civil penalty in the amount of One Thousand Dollars (\$1,000.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondents.

Copies of this decision shall be served on the parties.

In re: TOMMY TURNER. P&S Docket No. 6608. Decided October 3, 1986.

Victor Palmer, Administrative Law Judge.

Ben Bruner, for complainant.

Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Tommy Turner, d/b/a Tommy Turner Cattle, hereinafter referred to as the respondent, is an individual whose mailing address is P. O. Box 585, Tulia, Texas 79088.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Engaged in the business of a dealer within the meaning of that term as defined in the Act and subject to the provisions of the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Tommy Turner, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations;

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which they are drawn to permit their payment upon presentation;

3. Failing to pay, when due, the full purchase price of livestock; and

4. Failing to pay the full purchase price of livestock.

Respondent Turner is prohibited for a period of eighteen (18) months from engaging in business or operating subject to the Act as a market agency, buying or selling livestock in commerce on a commission basis or furnishing stockyard services, or as a dealer, buying or selling livestock in commerce either on his own account or as the employee or agent of the vendor or purchaser, and thereafter until such time as he complies fully with the bonding requirements under the Act and the regulations.

Provided, a supplemental order will be issued terminating the prohibition provision set forth above at any time after the expiration of sixty (60) days upon demonstration by respondent that (1) the unpaid livestock sellers set forth in paragraph III of the complaint have received full payment and (2) that he is in full compliance with the bonding requirements.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: LANDMARK BEEF PROCESSORS, INC., JOHN M. BURBANK, ALAN SILVERBERG, RONALD HILLMAN, and CHAIM TREIBATCH. P&S Docket No. 6174. Decided October 6, 1986.

Victor Palmer, Administrative Law Judge

Allan Kahan, for complainant.

Pro se, for respondents.

CONSENT DECISION WITH RESPECT TO RONALD HILLMAN

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, and a subsequent Amended Complaint and Notice of Hearing alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Ronald Hillman admits the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing as they pertain to him and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Ronald Hillman, hereinafter referred to as respondent Hillman, is an individual whose mailing address is 19120 Menard Place, Tarzana, California 91356.

2. Respondent Hillman is, and at all times material herein was:

(a) Secretary of Landmark Beef Processors and a principle owner of the stock of Landmark Management Company, a holding company which owns 100% of the stock of the corporate respondent;

(b) With John M. Burbank, Alan Silverberg, and Chaim Treibatch, responsible for the management, direction and control of the policies and practices of respondent Landmark Beef Processors; and

(c) A packer within the meaning of and subject to the provisions of the Act.

CONCLUSIONS

Respondent Ronald Hillman having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Ronald Hillman, his agents and employees, individually or through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, for meat and meat food products purchased;

2. Preparing and using any false, misleading, incorrect or incomplete financial statements or inventory reports for the purpose of inducing suppliers and vendors of meat and meat food products to sell or otherwise transfer such products to respondents.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in his business subject to the Packers and Stockyards Act and the regulations, including, but not limited to: (1) invoices and other accountings which disclose all purchases and sales of meat or meat food products; (2) records of all receipts and disbursements; (3) a general ledger of accounts disclosing respondent's assets, liabilities, income, expenses and net worth; and (4) an accurate and current inventory record.

Respondent shall keep and maintain, and shall not destroy or otherwise dispose of, any purchase invoices, sales invoices, inventory records, or similar accounts and records documenting the purchase and sale of meat or meat food products for a minimum period of two years. In addition, respondent shall strictly comply with the provisions of section 203.4 of the statements of general policy (9 CFR § 203.4).

Respondent Ronald Hillman is hereby assessed a civil penalty in the amount of Ten Thousand Dollars (\$10,000.00), payable within thirty (30) days of the effective date of this decision.

The provisions of this order shall become effective on the first day after service of this decision on respondent Ronald Hillman.

Copies hereof shall be served upon the parties.

In re: PORK CUTTERS, INC., DON BIRAKOWSKY, and MARGA BIRAKOWSKY. P&S Docket No. 6457. Decided August 29, 1986.

William J. Weber, Administrative Law Judge.

Allan Kahan, for complainant

Kevin Nash, New York, N.Y., for respondent.

DECISION AND ORDER

Complainant has failed to sustain the burden of proof to establish that respondents have willfully engaged in an unfair, unjustly

discriminatory or deceptive practice in violation of § 202(a) of the Packers and Stockyards ("Act") (7 USC 192(a)) by reason of respondents' failure to pay some \$945,000 for meat and meat food products purchased by respondent.

Respondents purchased "packer style hogs," i.e., hog carcasses cut in half to be further cut for commercial and wholesale uses, and sold to wholesalers, jobbers and provision houses in the New York City area.

Respondents, Don and Marga Birakowsky started the business on a shoestring in 1964, doing all the work themselves. Don's only skill was with a knife, and Marga was without any experience in administration or bookkeeping. However, the business at first was so small that the two of them operated it, working almost round the clock, by themselves. Marga learned bookkeeping from an accountant who came in once a month.

Their sole supplier since 1964 was Arbogast and Bastian, Inc., (A&B). Short-term credit was given to respondents and as the relationship grew and strengthened, the credit terms lengthened to about 40 days.

Respondents agreed to pay A&B for delivered hog carcasses on a formula price based on the nationally reported averaged price for prime live hog sales in four designated cities. Later a \$3.50 "kill fee" was added to the formula. The relationship apparently was mutually beneficial for some years.

A bookkeeper, salesman, driver, and eleven butchers or butcher helpers were eventually employed in respondents' business.

About 1980, the supplier, A&B underwent a change of management.

Respondent Marga Birakowsky was forced to cut back her working time in the business, from the mid-1970's, due to the terminal illnesses of her son, and in the 1980's, her mother. Marga was also ill some of the time herself.

In the 1980's, respondents' business slowed, but respondents believed it was due to a general business slowdown. In 1983 their financial situation became critical. In checking, Marga Birakowsky discovered the pricing formula had been unilaterally changed by A&B when A&B changed management.¹

The effect of the change was a substantial hidden price increase to respondents.

¹ The findings concerning the relationship with A&B are subject to a caveat discussed letter.

Marga Birakowsky was convinced that A&B had cheated them. When she confronted A&B's officers with these charges, they gave evasive responses.

A financial crisis was reached where respondents could not continue in business and they sought legal assistance. Their attorney recommended bankruptcy. When A&B was notified, A&B requested a meeting with respondents and respondents' attorney in August 1983. (TR. p. 192)

"Overcharges" claimed by respondents were discussed at the August 1983 meeting with A&B. A&B promised to "work out" the claimed "overcharges" if given "time." (TR p. 193) A new price formula at reduced rates to compensate respondents for past overcharges was agreed to. (TR p. 194) Respondents then agreed to continue in business and abandoned the bankruptcy proposal.

Respondents continued to buy from A&B, and pay the outstanding invoices. A&B needed the disputed invoices paid, as well as the subsequent invoices at the newly adjusted price, because of A&B's banking arrangements. Refusal to pay the disputed invoices would have precipitated immediate failure for both respondents and A&B at that time.

About 9 months later, in May 1984, A&B failed. Respondents having relied on A&B as a sole supplier for over 18 years, also failed. Respondents owed A&B about \$945,000 for the last 40 days purchases.²

The accumulated unrecovered losses from the A&B "overcharges" plus additional losses when respondents failed to continue to supply their customers finally killed respondents' business.

Pork Cutters was unable to pay A&B, in part because of the accumulated losses from 1980 due to A&B's "overcharges." In respondents perception, the "overcharges" by A&B were not yet "worked out" and should be used as an offset against the \$945,000.

Respondents were so acutely sensitive to debts that they closed their business for a short time in August 1983, because they wanted to avoid "going deeper into debt." (TR p. 231-232) Then the meeting with A&B promising to "work out" the claimed "overcharges" by a new price formula gave respondents new hope. But when the business failed, the "overcharges" had not yet been "worked out," as the Birakowsky's saw it.

A&B had brought suit against respondents for \$740,000 and respondents had counterclaimed for the alleged fraudulent "overcharging" by A&B. (TR p. 231) The August 1983 meeting apparent-

² During the last 40 days respondent paid A&B about \$980,000 for earlier purchases. (TR P. 138)

ly put this litigation on the backburner, while the parties "worked out" their differences under the new pricing formula.

Pork Cutters computed the alleged overcharges in a conservative manner, based on averages for prime hogs only (not all the delivered hogs fell into the prime category). This gave A&B the benefit of doubt on any differences in the calculations. Calculating each individual transaction at the lesser price appropriate for non-prime hogs would have resulted in even greater overcharges, Marga believed.

The "overcharges" were calculated by Marga for their civil litigation with A&B (TR p. 185), and not as an afterthought to raise as a (fictional) defense in this disciplinary proceeding.

In the last half of 1981, Pork Cutters computed overcharges of \$276,972.59 arising from \$6,500,704.45 in purchases billed by A&B to Pork Cutters. Pork Cutters recomputing the billings on the original price formula, claims the billings should have been \$6,223,731.86. (TR p. 212)

During 1982, Pork Cutters computed alleged overcharges of \$917,199.23 on purchases of \$12,111,266.47. (TR p. 187)

Overcharges of \$542,756.05 were computed by pork cutters on 1983 purchases of \$5,552,826.69. (TR p. 219-220)

Pork Cutters thus computed a total of more than \$1.7 million "overcharges" which more than offset, in its view, any obligation it owed.

When complainant's investigator went to Pork Cutters' office to check their records, only Don Birakowsky was there. He had no knowledge of the books and records and urged the investigator to return on an agreed date when Mrs. Birakowsky was expected to be there. The investigator agreed and did so.

Mrs. Birakowsky's mother was terminally ill and Mrs. Birakowsky was directing all of her time and energy to her mother. When the investigator returned on the agreed date, Mrs. Birakowsky was not there. However, Don saw that the investigator had access to all the records he desired.

Throughout to the investigation, from the initial stages, the question of A&B's overcharges offsetting Pork Cutters' obligations to A&B were raised by the Birakowskys. (TR p. 17, 18, 21, 22, 106, 132, 133, 136, 259, 260, and 261)

Complainant's investigator made a thorough and full investigation to the extent that he could. However, due to the serious illness of Mrs. Birakowsky's mother, the lack of understanding by the Birakowskys of the seriousness of the investigation, and unfortunate legal advice, the Birakowskys failed to provide the degree of cooperation that the law required and their best interest should have

provided. Respondents refusal or failure to cooperate for whatever justification was a subject that also arose frequently. (TR p. 21, 66, 67, 107, 137, 138, and RE9, 10). That failure to cooperate was unjustified and unwise and probably in violation of the regulations. However, that failure should not be a barrier to consideration of respondents contentions of overcharges offsetting the failures to pay.

The Birakowskys testimony is exceptionally persuasive, and warrants full probative value.³

Complainant makes out a well documented, and in fact admitted, failure to pay over \$945,000.00. But the respondents evidence indicating very large overcharges cannot be casually brushed aside as irrelevant and inconsequential.

Complainant did not call anyone from A&B in rebuttal. Without question, that would be important to decide the merit of the overcharge issues. However, the ultimate merits of the overcharge issue between A&B and Pork Cutters is not being determined here. That will be decided in their civil litigation.

The issue here is whether respondents' evidence is sufficiently probative to explain and justify the failure to pay A&B. This is a disciplinary action, not a civil suit for damages or collection of overdue bills.

The complaint charges respondents "willfully" engaged in an "unfair, unjustly discriminatory, or deceptive practice." (7 USC 192(a)) This hinges on whether respondents' failure was "unjustifiable."

Complainant agrees that "justification" is a hinge issue. Complainant argues that respondents "unjustifiably" refused to pay A&B. Pages 7-8, complainant's Proposed Findings of Fact, Conclusions, and Brief in support thereof filed 5/2/86.

In essence, respondents claim to have been defrauded by A&B when A&B unilaterally changed the agreed pricing formula, increasing the price significantly. This record shows no changes in that agreed pricing formula for 16 years, except for adding the \$3.50 "kill fee."

In this context it cannot be said that respondents were unreasonably careless or "unjustified" in relying on the integrity of their supplier. Respondents may have been imprudent or naive, but that should not trigger heavy disciplinary penalties based on unfair trade practices.

³ In 31 years as a trial Judge, the Birakowskys rank very high for sincerity, persuasiveness, credibility and probative value.

On this record, it is uncontroverted that a problem existed in the summer of 1983 that brought A&B and Pork Cutters together to discuss their mutual obligations and responsibilities. Thereafter, Pork Cutters abandoned bankruptcy and continued to do business with A&B under a new, reduced pricing formula.

The evidence in this record explains the price reduction as A&B's effort to "work out" the "overcharges." Complainant argues that the price concession was made for A&B's advantage (and needs), rather than to "work out" a dispute with respondents. The credible evidence here supports respondents' position contrary to complainant's argument.

No criticism is implied concerning complainant's investigator and none should be inferred. The investigator was thorough, complete and vainly tried to pry from respondents the information necessary to support or verify their claims of overcharges.

Considering the life history of respondents, it is not difficult to understand their fear and reluctance to cooperate with governmental authorities, although, it was a serious mistake here. That failure however, should not bar them from serious consideration of their plea and evidence they present concerning it.

Other than the dispute with A&B concerning the pricing formula, this record is devoid of anything suggesting a lack of integrity and sincerity in respondent's testimony and evidence. That is not to say that each jot and tittle is accurate and fully in conformance with reality. That is not necessary.

Complainant here seeks a \$90,000.00 civil penalty from the individual respondents. The corporate respondent is not operating and is probably insolvent. The issues are seriously disputed. Complainant has established that respondents have failed to pay \$945,000 to A&B for the last 40 days purchases.

However, respondents have established that a serious dispute exists between A&B and respondents, that efforts were made to resolve it, that both parties acted on that resolution for 9 months. Further, according to respondents, the resolution was "working out" the differences, but the unworked out portion far exceeded respondents' obligations to A&B at the time the businesses failed. Although, the record does not support each item of respondents' testimony by documentary evidence, that is not necessary here. The credibility, persuasiveness, and consistency of respondents evidence is strong.

It is not being determined here what obligations A&B might have to Pork Cutters but merely that Pork Cutters' evidence is suffi-

ciently meritorious to justify their failure to pay until the dispute is resolved in an appropriate civil forum.⁴

Regardless of the ultimate outcome there, the evidence here establishes that a serious, extensive dispute exists between respondents and A&B, concerning possible fraud, which relates to and arises from possible "overcharges" by A&B.

This justifies respondents failure to pay til that dispute is resolved. A \$90,000.00 civil penalty should not be assessed against the Birakowskys individually.

Considering all the evidence in this record, the complainant has failed to sustain the burden of proof. There is not a preponderance of the evidence showing respondents' willfully failed to promptly pay obligations it owed to A&B. The evidence establishes that the outstanding obligations from Pork Cutters to A&B were the subject of serious and still unresolved dispute.

* * * * *

ORDER

The complaint is dismissed with prejudice.

[The Decision and Order became final on October 14, 1986.—Ed.]

In re: OZARK COUNTY CATTLE COMPANY, INC., DWIGHT LEDBETTER, LEDBETTER LAND AND CATTLE COMPANY, INC., and H.H. LEDBETTER, NATIONAL ORDER BUYING COMPANY OF ST. JOSEPH, MISSOURI and THOMAS D. RUNYAN, DIXIE NATIONAL STOCKYARDS, INC., ABRAHAM CATTLE COMPANY, INC., and DR. LEROY ABRAHAM, and JEFFREY JACKSON. P&S Docket No. 6743. Decided October 15, 1986.

William Weber, Administrative Law Judge

Ben Bruner, for complainant.

Dee Wampler, Springfield, Mo., for respondents.

CONSENT DECISION WITH RESPECT TO OZARK COUNTY CATTLE COMPANY, INC., AND DWIGHT LEDBETTER

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Depart-

⁴ Complainant argues that the Uniform Commercial Code is a potential barrier to respondents' claimed "overcharges" against A&B. That may or may not be accurate. However, a legally perfect state of mind should not be a prerequisite here for "justification."

ment of Agriculture, alleging that the financial condition of respondents Ozark County Cattle Company, Inc., and National Order Buying Company of St. Joseph, Missouri, does not meet the requirements of the Act and that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondents Ozark County Cattle Company, Inc., and Dwight Ledbetter admit the jurisdictional allegations in paragraph I of the complaint as they pertain to them and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Ozark County Cattle Company, Inc., hereinafter referred to as respondent Ozark, is a corporation organized and existing under the laws of the State of Missouri. Its mailing address is P. O. Box 397, Gainesville, Missouri 65655-0397.

2. Respondent Ozark at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis;

(b) Engaged in the business of buying and selling livestock in commerce for its own account; and

(c) Registered with the Secretary of Agriculture as a market agency to buy livestock in commerce on a commission basis, and as a dealer to buy and sell livestock in commerce for its own account.

3. Respondent Dwight Ledbetter is an individual whose business mailing address is P. O. Box 397, Gainesville, Missouri 65655-0397.

4. Respondent Ledbetter at all times material herein was:

(a) President of respondent Ozark;

(b) Owner of 100% of the outstanding stock of respondent Ozark; and

(c) Responsible for the direction, management and control of respondent Ozark.

CONCLUSIONS

Respondents Ozark County Cattle Company, Inc., and Dwight Ledbetter having admitted the jurisdictional facts as they pertain to them and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Ozark County Cattle Company, Inc., and respondent Dwight Ledbetter, their officers, directors, agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Engaging in business as a dealer or market agency while their current liabilities exceed their current assets;

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

3. Failing to pay, when due, the full purchase price of livestock; and

4. Exchanging drafts or checks with any person for the purpose or with the effect on concealing the true amount of funds available in any checking or other bank account, or of creating a false "float" or balance in any such account.

Respondent Ozark County Cattle Company, Inc., is suspended as a registrant under the Act for a period of ten (10) years and thereafter until it demonstrates that it is no longer insolvent. When respondent demonstrates that it is no longer insolvent, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the ten (10) year period.

Respondent Dwight Ledbetter is prohibited from operating subject to the Packers and Stockyards Act for a period of ten (10) years, provided that after the expiration of eighteen (18) months of the prohibition, a supplemental order will be issued permitting respondent Dwight Ledbetter to work as a salaried employee of a registrant.

The provisions of this order shall become effective on the sixth day after service of this order on respondents Ozark County Cattle Company, Inc., and Dwight Ledbetter.

Copies of this decision shall be served upon the parties.

In re: BURKHART ENTERPRISES, INC., d/b/a BURKHART LIVESTOCK,
and DENZIL E. BURKHART, P&S Docket No. 6700. Decided Octo-
ber 16, 1986.

Dorothea A. Baker, Administrative Law Judge.

John Casey, for complainant

Brack Jones, Beaumont, Texas, for respondent

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 181 et seq.) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondents Burkhardt Enterprises, Inc. and Denzil E. Burkhardt admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Burkhardt Enterprises, Inc., hereinafter referred to as the corporate respondent, at all times material herein was a corporation organized and existing under the laws of the State of Texas, and was doing business as Burkhardt Livestock, with a principal place of business located at Route 7, Box 155, Beaumont, Texas.

2. The corporate respondent among other things at all times material herein was:

a. Engaged in the business of buying and selling livestock in commerce for its own account as a dealer; and

b. Registered with the Secretary of Agriculture as a dealer to buy and sell cattle in commerce for its own account.

3. Denzil E. Burkhardt, hereinafter referred to as the individual respondent, is an individual and, at all times material herein, was the President of the corporate respondent, and residing at the same address.

4. The individual respondent among other things at all times material herein was:

a. Responsible for the direction, management, and control of the corporate respondent; and

b. Engaged in the business of a dealer, buying and selling livestock in commerce.

CONCLUSIONS

Respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Burkhart Enterprises, Inc., its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, and Denzil E. Burkhart, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Purchasing livestock and in purported payment therefor issuing checks without having sufficient funds on deposit and available in the account on which such checks are drawn to pay such checks when presented.

2. Purchasing livestock and failing to pay when due the full purchase price of such livestock.

Respondent Burkhart Enterprises, Inc. is suspended as a registrant under the Act for a period of five (5) years.

Respondent Denzil E. Burkhart is prohibited from engaging in business in any capacity subject to the Act for a period of five (5) years, provided, however, that upon application by respondent Denzil E. Burkhart to the Packers and Stockyards Administration, a supplemental order may be issued terminating this prohibition after 45 days, upon demonstration that all unpaid livestock sellers have been paid in full, and provided further that this prohibition may be modified upon application to the Packers and Stockyards Administration to permit respondent Denzil E. Burkhart to be employed by a registrant, after expiration of the 45 day period.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondents.

Copies of this decision shall be served on the parties.

In re: SUE VIRTUE, P&S Docket No. 6701. Decided October 16, 1986.

Victor Palmer, Administrative Law Judge.

Peter Train, for complainant

Pro se, for respondent

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Sue Virtue, hereinafter referred to as the respondent, is an individual whose business mailing address is 11783 Blake Road, Galt, California 95632.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for her own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for her own account. Such registration has been inactive since April 3, 1980.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Sue Virtue, her agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an

adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until she complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that she is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars (\$500.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: MANUEL PERRY. P&S Docket No. 6513. Decided September 10, 1986.

Dorothea A. Baker, Administrative Law Judge.

Allan Kahan, for complainant.

Max Mickelsen, Petaluma, Calif., for respondent.

DECISION AND ORDER

This is an administrative, disciplinary proceeding under Title III of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. 181, *et seq.*), hereinafter sometimes referred to as the Act, instituted by a Complaint, filed on March 29, 1985, by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture.

The Complaint alleges that Respondent Manual Perry, in connection with his activities as a dealer subject to the Act, sold ten (10) calves to Rancho Veal Corporation, a packer. In connection with the sale, Respondent signed a "guaranty" stating that no animal being sold "contained a non-permitted residue of a drug in its edible tissue; that since the last drug administered to the animal . . . the withdrawal period . . . has passed; and that all label warnings and directions "for use have been followed in the administration of any drugs to the animal." Although Rancho Veal Corporation purchased only "certified" calves, there is controversy as to the extent, if any, that such certification was relied upon by Rancho Veal in the purchase and slaughter of the calves in this case.

However, after slaughter and testing, two of the calves were found to contain violative levels of residues of an antibiotic drug.

Upon the basis of the aforesaid, the Respondent is alleged to have "engaged in unfair and deceptive practices" in willful violation of section 312(a) of the Act (7 U.S.C. 213 (a)).

On April 25, 1985, Respondent filed an Answer to the Complaint in which he admitted the facts of the transaction set forth in the Complaint, denied that he willfully engaged in any unfair or deceptive practice or act, and denied any intentional, willful or negligent marketing of any calves for slaughter that he knew or should have known contained violative levels of drug residues. Respondent's Answer further denied that Rancho Veal Corporation relied on the written "guaranty" in its purchase, marketing or slaughter of livestock.

The Agency Complainant indicates that this is a case of first impression and is meant to send a message to Respondent and to the industry in general, that the "certification" program hereinafter described will be strictly enforced with significant penalties.

The Respondent contends that the facts do not justify the stance taken by Complainant and that *written* regulatory requirements were unclear or non-existent as to the proper method of achieving "certification".

The case takes on particular importance to three agencies within the Government: The Packers and Stockyards Administration, United States Department of Agriculture, which brought the Complaint; the Food, Safety, and Inspection Service of the Department of Agriculture which is charged with inspecting meat and insuring that it is wholesome and safe to eat; and, the Food and Drug Administration which sets standards with respect to the amounts of residues which can be contained in food for human consumption.

Said Governmental agencies, particularly, the Packers and Stockyards Administration, believe that the practice of certifying something as being drug free, when Respondent was in no position to be able to so certify such fact, and the effect on the packers, as well as the potential danger to the meat supply of America, constitutes an unfair and deceptive practice under the Packers and Stockyards Act.

The case also takes on importance because of the background against which it is thrust. It was discovered in 1981, that there was a problem with sulfa and antibiotic residues in bob veal meat nationwide, and, commencing in 1982, and continuing until February, 1984, when it was decided that the program "had failed miserably", there was an effort to resolve the problem and to try to educate the farmers. This did not work, notwithstanding the expenditure of \$2 million in funds. In trying another approach, an "interim rule with request for comments" was published in the Federal Register,

Thursday, June 7, 1984 (42 F.R. 23602) relating to drug residues in young calves.

An oral hearing took place on May 13, 15, and 16, 1986, in Sacramento, California, before Administrative Law Judge Dorothea A. Baker. Respondent was represented by Max A. Mickelsen, Esquire, 205 Keller Street, P.O. Box 2538, Petaluma, California. Complainant was represented by Allen R. Kahan, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. 20250. Complainant called sixteen witnesses and offered nineteen exhibits. Respondent called two witnesses and offered two exhibits. The transcript of the hearing comprises four hundred fifty-four (454) pages. References to specific pages in the transcript will hereinafter be designated by the prefix "Tr."

In due course, the parties filed briefs, with the last brief having been filed August 4, 1986.

FINDINGS OF FACT

1. Manuel Perry, hereinafter referred to as the Respondent, is an individual whose business mailing address is 673 Lohrman Lane, Petaluma, California 94952.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and,

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce and as a market agency to buy livestock on a commission basis in commerce.

3. Respondent regularly purchases "bob" calves, i.e., calves less than three weeks old and weighing less than 150 pounds, from dairy farmers in the Galt and Lodi, California area. He follows a procedure, in purchasing said "bob" calves of specifically inquiring as to whether the calves have been "medicated". The health of the calves may require such medication and, as herein pertinent, there is nothing illegal in the administration of such medication. As to any calves Respondent is advised have been medicated, they are marked and sold for "raising" (kept for a week or so), instead of for slaughter.

4. After Complainant concluded that its prior program relative to voluntary certification of drug free animals was not working, Complainant, in May of 1984, caused to be distributed to auction markets and to others a "flyer" relative to the certification program, but this was not sent to dealers such as the Respondent Perry (Tr. 130, 131). In June of 1984, there was published in the Federal Register, aforementioned, proposed regulations where identification

and voluntary certification of drug free animals were contemplated.

5. On January 4, 1985, Respondent received a letter, dated January 2, 1985, from the Packers and Stockyards Administration's Lawndale, California, office informing him that two veal calves which he had previously sold to Rancho Veal Corporation in December of 1984, had been found to contain violative drug residues which caused the carcasses to be condemned. The letter informed Respondent of the requirements of obtaining certifications from the producers of the animals that the animals were "drug free". More specifically, the letter advised: "A calf dealer cannot represent a calf to be drug free unless he has a valid certification from the producer." . . . "Also, certification without knowledge of whether or not drugs have been administered would be considered a false certification." . . . "You must also retain evidence in your records that the calf was certified by the producer." The letter further informed Respondent of the position of the Packers and Stockyards Administration that providing false certifications by a dealer was considered an unfair and deceptive practice contrary to Section 312 of the Packers and Stockyards Act, and that such violations could subject him to both criminal penalties, and to a civil penalty of up to \$10,000 for each violation.

6. On January 7, 1985, Respondent Perry made a telephone call to Mr. Kenneth Freeze, Regional Supervisor of the Lawndale, California, office of the Packers and Stockyards Administration to discuss the contents of the letter he had received. Respondent Perry stated to Mr. Freeze that he had been in business for 25 years and that he had never had any trouble with the Packers and Stockyards Administration and that he was too old to get into trouble now. Mr. Freeze told Respondent not to sign any more certifications with Rancho Veal unless he had written certifications for the animals involved, contained in his records, and signed by the producers. Respondent was told that the giving of certifications to Rancho Veal without the corresponding written certifications from the producers would be considered an unfair practice contrary to the Packers and Stockyards Act and could subject him to a civil penalty of up to \$10,000 for each violation. Respondent Perry, in his testimony indicated that he did not remember if Mr. Freeze told him to have the producers sign anything.

7. On or about January 15, 1985, Respondent purchased forty-eight (48) bob veal calves (sometimes referred to as "drop calves") from a number (approximately ten) of dairy farmers in the Galt, and Lodi, California, area. By reason of past inquiries and instructions to said dairy farmers and/or their employees, Respondent be-

lieved that the said calves were not medicated. However, he did not ask his usual question as to medication or not of the calves.

8. Respondent disposed of thirty-eight (38) of the calves to a calf feeder in the Petaluma, California, area.

9. Respondent sold the remaining ten (10) calves to Rancho Veal Corporation, a packer located in Petaluma, California. When a calf was condemned, Respondent did not get paid for it. In order to sell the said calves to Rancho Veal, Respondent signed a document presented to him by Rancho Veal, which, because of its importance to this case, is reproduced herein in full:

10. A scrutiny of Complainant's Exhibit 10. as aforesaid, reveals several things: It is labeled "Draft"; it was contemplated that the guarantor would be the "producer or auction market" (Respondent was neither); and, such guarantee is to be applicable to each subsequent shipment or other deliveries of animals etc. Mr. Perry was indicated to be the person giving the guaranty. Said document does not use the word certify or certification anywhere in the document. Without seeking to make meaningless distinctions, "certification" has been said to be the act of certifying a document containing a certified statement especially as to the truth of something; whereas, "guaranty" is said to be an undertaking to answer for the payment of a debt or the performance of a duty of another in case of the other's default or miscarriage. It is doubtful that any distinction is made by the Complainant between a certification and a guaranty, and, certainly, while the Respondent was waiting to unload and sell his calves, and was told he had to sign a form to do so, he probably was not concerned too much with the language in the form. He believed that the calves which he wanted to sell did meet the requirements, based upon his past understanding with the dairy farmers.

11. After the calves were slaughtered, a small number of the calf carcasses (known as the lot sample) purchased by Rancho Veal on January 15, 1985, which had been the subject of the guaranty set forth above and stated to be "drug free", were tested by Dr. Lee T. Watt, DVM, the Federal meat inspector, the Food Safety and Inspection Service, U.S. Department of Agriculture, to determine if any of the edible tissue of the animals, which included the muscle, liver, and kidney, contained violative levels of sulfa or other antibiotic residues. Two of the animals belonging to the Respondent Perry, which were in the sample tested by Dr. Watt, tested positive.

12. Portions of tissue from the muscle, liver and kidney from both of Respondent's calves which tested positive were sent to the Western Laboratory of the Food Safety Inspection Service of the U.

DRAFT

Food and Drug Administration
DEPARTMENT OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C.

Guaranty

To: HANCHO VEAL CORP.
(dealer or packer)

1-15
(date)

1522 PETALUMA BLVD. NO.
(address)
PETALUMA, CA 94952

_____ hereby guarantees; that no animal listed
(producer or auction market)
herein is adulterated within the meaning of the Federal Food, Drug and
Cosmetic Act in that it contains a nonpermitted residue of a drug in its
edible tissues; that since the last drug was administered to the animal by
injection, oral application, or topical application, the withdrawal period
specified in the labeling of the drug has passed; and that all label warnings
and directions for use have been followed in the administration of any drug
to the animal. Each subsequent shipment or other deliveries of animals is
hereby guaranteed as of the date of such shipments or delivery, to be, on
such dates, not adulterated or misbranded within the meaning of the Food,
Drug and Cosmetic Act.

and
10 DO

Ear tag or Other Identification

COMPLAINANT'S EXHIBIT NO. 10
PAGE _____ OF _____

Manuel Perry
SIGNATURE OF PERSON GIVING GUARANTY

FEB 11 1983

S. Department of Agriculture to confirm the initial test and to determine the particular drug involved, as well as the amount of violative drug residue present. Bio-assay tests were run on the various tissue samples from the liver, muscle, and kidney of the two carcasses. The test confirmed the presence of violative levels of Neomycin in the kidneys of the two carcasses in the amounts of 17.55 and 13.35 ppm. The maximum permissible level or "tolerance level" is 0.25 ppm. Thus, the kidneys of the two carcasses contained levels of a non-permitted drug in excess of sixty-nine (69) and fifty-three (53) times the permissible tolerance.

13. Whether the Complainant's Exhibit 10, signed by the Respondent, be regarded as a "certification", "guarantee" or a simple statement, the evidence clearly shows that the calves delivered to Rancho Veal on January 15, 1985, were represented to be drug free when in fact at least two were not. This is a violation of section 312 of the Packers and Stockyards Act.

14. Although the Respondent has set forth arguments relative to the lack of intent to be in violation, good faith effort and intent to comply, extenuating circumstances relating to his instructions to the dairy farmers, and a position that alludes to the lack of specificity as to the manner required for compliance with the program, nevertheless, the evidence establishes that the Respondent did receive earlier notice in the letter of January 2, 1985, of the consequences of giving false certifications, and, there was contained in such letter, in the last full paragraph, the following statement:

Section 401 of the Packers and Stockyards Act requires every packer, stockyard owner, market agency, and dealer to "keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business". To meet this requirement in transactions involving baby calves certified as drug free, you must keep a record of all calves purchased and sold, including the name and address of the seller, the name and address of the person to whom sold, the tag number or other identity of each animal purchased and sold, and the amount paid or received in each transaction. *You must also retain evidence in your records that the calf was certified by the producer.* (emphasis added)

Furthermore, the Respondent had a telephone conversation with Mr. Freeze who further explained the certification program to him.

15. The record evidence herein does not show a *knowing*, wanton disregard of the program requirements on the part of the Respondent, but, rather, less than a diligent attempt to comply therewith. The Respondent believed that it was sufficient that he made in-

quiry, on a regular basis, of the dairy farmers or the person taking care of the calves, as to whether the calves were medicated, and, that he informed each of the dairymen of his desire to have calves that were not medicated, although there was no evidence presented that he specifically did either of those things on the date of the transactions herein involved.

The Complainant admits that the Respondent "occasionally" inquired about the status of the calves. The weight of the evidence is that the Respondent made such inquiries on a regular basis, although on the day in question, the Respondent testified that he may have failed to ask his usual question.

Events have shown that the methods used by the Respondent could not be relied upon, particularly in light of the fact that prior to January, 1985, the Respondent did not consistently identify the calves with a unique back-tag number, and they easily could become co-mingled once on his truck. This is not to say that the producers mislead the Respondent, as their testimony shows:

(Mr. Simoes)

- Q. "Okay. Did you mark the calves which might have been treated with electrolytes, or other medication?"
- A. "Well, all the Calves that have been treated, we marked the cages."

(Tr. 278)

- Q. Okay, in January of 1985, did Perry ask about the calves which he purchased, and whether they had been medicated?
- A. Oh, he asked me all along if the calves had been medicated.
- Q. Okay, if you weren't there, who would he have asked?
- A. He asks my workers. I—I mark the cages so they can tell him. (Tr. 280)
- Q. Do you identify them in such a fashion? You know, do you mark them?
- A. Well, when I treat them, I mark the cages. (Tr. 284)
- Q. Okay, if he knew they were medicated——
- A. Put's a mark over the back. (Tr. 285)

Judge BAKER: You would not know what the directions on the label state?

WITNESS: No. Well, I get—the directions I got I get from the—I go to the veterinarian, and they'll tell me what to use, and I use.

Judge BAKER: And they read it to you.

WITNESS: Yeah. Yeah.

(Tr. 287)

16. The action of the Respondent, under the circumstances of this case, in representing, by means of a written statement or "guaranty" that the calves were drug free, when they were not, is a willful violation of the Packers and Stockyards Act, as that term has been interpreted by the Department of Agriculture.

17. Dr. Waguespack, the Regional Director of Food Safety Inspection Service's Southwest Region, comprised of eight States, testified, in detail concerning the program and its objectives. He was a most knowledgeable witness and explained the desirable effects the program would have on the industry if the written certification practice were adhered to, but, he admitted that after the expenditure of large amounts of money and time, the program was not working as expected.

18. Dr. Waguespack further indicated, in his testimony that there is nothing in the regulations which requires a written certification signed by the producers, although according to him, a certification was valid only if written. He stated that there was no set form for such certification and it could be a simple statement which followed the calves, and, that one piece of paper can follow many animals as long as identity is maintained. Of importance in his testimony was the assertion that the producer would not be certifying that there was no drug residue in the calves, but, only that he did not administer same, or, if he did, what occurred, and the withdrawal period.

19. As Complainant sets forth, and as the evidence shows, Rancho Veal had good reason why reliance on certified calves was to its advantage:

- (1) Labor cost savings;
- (2) Less overtime;
- (3) Less disruptions of a packer's operations; and
- (4) More efficient use of a packer's cooler.

As compared to the testimony of the general advantage to a packer of certified calves, there was no direct and convincing evidence

that Rancho Veal relied upon Exhibit 10, paid any heed thereto or was harmed in any way, although at the time it was purchasing only certified calves. Respondent had dealt with said concern over a period of years, and, Rancho Veal knew that Respondent was not a producer. However, it is not necessary that actual reliance be shown. It is sufficient that Rancho Veal had a right to place reliance on such guaranty or certification.

20. The fact that some of the dairymen and/or their employees did not speak or read English has not been shown to be relevant or material to the issues of this case. In any event Respondent had no difficulty in conversing with such individuals because he spoke several languages.

21. The giving of false certificates constitutes a serious danger to the public health by potentially permitting violative levels of drug residues to enter the food supply.

22. The Respondent gave a false certificate to Rancho Veal Corporation on January 15, 1985.

23. The Respondent has willfully violated section 312(a) of the Packers and Stockyards Act.

CONCLUSIONS

The evidence is free of conflict in that Respondent, on January 15, 1985, sold ten bob calves to Rancho Veal Corporation, after having purchased them from dairy farmers; that Respondent signed a "guaranty" indicating such calves to be drug free; and, that subsequent testing showed two calves to have drug residues.

The Complainant views this as a most important case and one of first impression. Accordingly, its approach to the sanction sought was expressed by Mr. Davis, who, while recognizing that Respondent was a "small" operation, stated in his testimony:

Q. But you are still recommending the \$5000 sanction?

A. Yes.

Q. Because you want the attention of the industry?

A. Yes. We believe that it is appropriate to address a penalty that not only addresses the individual involved, but addresses the problem within an industry and serves notice on the industry as well." (Tr. 435).

Essentially, and in summary form, the Complainant maintains that the action of the Respondent was a "willful" one as that term is defined by the Secretary of Agriculture; that Respondent voluntarily executed the calf drug guaranty or certification; that the Re-

spondent signed a valid certification, irrespective of the name it is given; that despite the absence of specific language requiring that certifications have to be in writing, the Respondent herein had actual notification that certifications were to be in written form; that Rancho Veal relied upon the certification; and, that the sanction being sought is warranted, reasonable and meets the requirements of the Act.

Although large amounts of money have been spent, and much time devoted thereto, Complainant's witnesses admit the absence of satisfactory industry recognition of its program. It should be noted, as herein pertinent, that there was nothing illegal in administering the pertinent drugs involved to the calves. However, under Complainant's program, it was necessary that the applicable withdrawal period have expired, prior to certification that the calves were drug free.

Calves can be sold certified, or, non-certified—and that is a choice which the buyer can make. If a buyer finds that a seller is wrongly stating that calves are drug free, when they are not, the buyer can refuse to do business with such seller, as well as take whatever legal remedy is available to him. As the evidence shows, there is a tendency toward non-certified calves, notwithstanding the Complainant's program.

The record, as a whole, supports the contentions of the Complainant, except for its argument that Rancho Veal relied upon the certification. There is not enough evidence of record to show that, in this case, Rancho Veal did, in fact, rely upon the guaranty signed by Respondent. However, whether it did, or not, *Rancho Veal had a right to make such reliance.*

A concern raised by the Respondent is the one which addresses the issue of whether the Complainant, in the absence of regulatory directive, can require the generation of data to implement a program relative to drug residues, which admittedly had not been successful in the past with respect to its enforcement. The provisions of the Act, and the published regulations, as applied by the Complainant, require dealers such as Respondent to *generate, and maintain*, in their records written certifications. Yet, nowhere is this clearly spelled out so that persons, unaccustomed with technical language and implications, can understand it. In the subject case, the record shows that the Respondent had actual notice of what the Complainant expected.

The many contentions raised by the Respondent are ones deserving of attention and consideration, both of which have been accorded thereto.

The Respondent is charged with willfully violating Section 312(a) of the Packers and Stockyards Act, as amended. The Respondent indicated difficulty in delineating what, if any, violation of Section 312(a) was committed. The questions posed by Respondent are:

- (1) Was the alleged violation the fact that two bob calves were sold with illegal drug residues?
- (2) Was the violation the signing of the Guaranty presented to Respondent by Rancho Veal?

The position of the Complainant is that the violation was the signing of the guaranty without having a basis for knowing whether it was true or false.

The Respondent, in its pleadings, and by evidence adduced at the oral hearing, emphasized that there is no published regulation requiring a *written* certification. Although Section 401 of the Act requires certain record keeping requirements, which truly reflect the transactions engaged in by a dealer, it does not speak of generating data that customarily is not present in such transactions. Thus, the Complainant is expanding upon the previously known requirements by mandating that dealers, such as Respondent, if they want to sell calves, as drug free, obtain written certifications *from the producers* that the animal either has not been administered drugs, or if it has, that the necessary withdrawal period has passed. If this is done, then, even if the animal is subsequently condemned for drug residues, the dealer has committed no violation of the Act.

Among other concerns raised by Respondent, on brief, is that the Complainant's arguments, in its initial brief, do not display a working knowledge of the calf certification program, such as, that as to all medicated calves there was a ready, willing and able market with the industry. The dairymen knew, and the Complainant acknowledges, that calves sold for veal brought substantially more money than calves sold for slaughter. It was to the dairymen's benefit to deliver a healthy type calf rather than a sick one which would have to go to slaughter.

The Complainant suggests that the producers-dairymen who testified may have lacked candor with respect to their operations and may have been stretching the truth. The Judge finds that this is not justified on the record, and, that the testimony of such producers-dairymen was forthright and credible.

The realistic way those dairymen dealt with marketing their calves negates that there was any economic or profit motive behind their testimony. It made a lot more sense, economically, for those dairymen to mark calves as medicated, hold them for a week or

two, or some other applicable period, and then sell a healthy calf to the Respondent that would have a market value of \$40. or \$50. to a veal producer, as opposed to receiving approximately \$15. for a non-medicated calf.

Mr. Singleton, President and owner of Rancho Veal Corporation, verified this analysis:

"Q. What incentive is there for a livestock dealer to sell a medicated calf to a slaughter house such as yours?

A. There's no incentive. It's like throwing \$15, or \$20, or \$30 out the window, or whatever the calf is worth. If you knowingly know it's medicated." (Tr. 179)

Continuing on, the Respondent argues, on brief, that the most confusing aspect of Complainant's case is the contention that Respondent engaged in a deceptive and unfair practice by signing the aforesaid guaranty. The record herein adequately supports the reasons the Complainant has engaged in its drug certification program, even though during the years 1982-to the middle of 1984, it was not working satisfactorily. These reasons are well set forth in Complainant's brief and are not reiterated herein.

The Complainant spent considerable time in its presentation of the case to outline the history and procedure of the drug residue program instituted by the Food Safety and Inspection Service of the United States Department of Agriculture, in cooperation with the Food and Drug Administration and the Packers and Stockyards Administration. An explanation of the historical reasons for instituting the program; the resources expended to achieve the goal of removing violative amounts of sulfa and other antibiotic drugs in the veal meat supply; the procedures used to insure the integrity of the test; what success, if any, the program, including the educational aspects, has had in reducing the incidence of violative levels of drug residues; and the potential serious threat to public health as a result of violative residues of sulfa and antibiotic drugs in our Nation's meat supply, all were the subject of considerable evidence because of the importance thereof to all three Governmental agencies involved in the program.

As Dr. Waguespack testified, in 1981 the Food and Drug Administration and the Food Safety and Inspection Service of the United States Department of Agriculture both became very concerned over the problem of sulfa and antibiotic residues being found in bob calves. Testing disclosed that levels of sulfa and antibiotic residue contamination at levels of 100 to 1000 times the tolerance levels established by the Food and Drug Administration were being found

and constituted a threat to the health of consumers. (CX 1,p.4) In early 1982, a group of individuals representing industry, professional organizations, all the farm organizations and associations dealing with livestock, handling, growing, selling of milk, and meat-packers, met and worked for two years trying to resolve the problem by educating the farmers not to use medication or not to abuse medication in the bob veal meat supply. (Tr. 11) In February, 1984, the Food Safety and Inspection Service determined that the educational program was not working after having spent more than Two Million Dollars (\$2,000,000.00) in trying to get the word out through state extension services. The Food Safety and Inspection Service, the Food and Drug Administration and the Packers and Stockyards Administration then joined together to develop a regulation that could effectively address the problem. (Tr. 11-12) Because the FSIS is limited in its jurisdiction to the premises of the packing plants where it conducts meat inspection, but still has the responsibility to insure that the meat supply is safe and unadulterated by chemicals or disease, they joined with the Packers and Stockyards Administration to formulate a procedure that would be effective in reducing the problem—the voluntary certification program.

The certification program which was adopted permits the packer to slaughter calves which are certified "drug-free", chill them, and ship them to their customers without any retention or delay. A sample lot of three animals is tested, irrespective of the size of the certified lot, using the CAST test, to determine whether the certification is valid. However, the certified calves which are not in the test sample are *not* retained pending the results of the CAST test. Thus, the certification permits the unrestricted movement of the calf carcasses through the packing house without "tying-up" valuable cooler space within the packer's plant, and allows the packer to operate normally.

Non-certified lots, on the other hand, are not treated the same. A much larger sample of animals is selected from the group of non-certified calves. This can range from the entire population of calves in a small lot to as many as thirty (30) in a large lot of the animals. While the CAST test is performed on the sample lot, the entire group of non-certified calves is *retained* pending the results of the CAST test. Since the CAST test results take approximately sixteen (16) hours to be determined, the entire lot of non-certified calves must remain in the packer's cooler for this extra day. In addition, if any of the CAST tests taken on the animals in a sample lot of non-certified animals tests positive, the CAST test is performed on each and every one of the remaining calves in the non-certified lot.

Those carcasses testing positive are retained by the packer pending verification of the test, or are condemned immediately. Thus, there is a very real possibility of non-certified calves being retained for a total of *two* days, clogging the packer's valuable cooler space.

The testing of the slaughtered calves, done by the Federal meat inspector, is performed by making an incision into one of the calve's kidneys with a clean, unused razor blade, inserting a sterile cotton-tipped swab into the kidney to absorb the kidney fluid, placing the fluid-soaked swab tip onto an agar plate which has been seeded with bacterial spores, and incubating the plate for a period of sixteen (16) hours. After the incubation period is completed, the agar layer in the area around the head of the swab is carefully observed to see if there is an area that is clear of bacterial spore growth, the area known as the "Zone of Inhibition". A "Zone of Inhibition" 18mm or more constitutes a positive test, and indicates the presence of sulfa or other antibiotics. A "Zone of Inhibition" of less than 18mm, or a plate in which there is no zone of inhibition and the bacterial spore growth is to be seen everywhere except the area around the antibiotic disk, constitutes a negative test.

When a CAST test result is positive, the meat inspector removes one of the kidneys of the carcass involved, as well as portions of the animal's muscle tissue and liver, places each of the samples in separate specimen bags carrying a unique serial number for the particular animal, issues a special form providing particular information about the animal involved which also contains the serial number, and sends the sample, in a temperature controlled condition, to the laboratory of the Food Safety and Inspection Service for confirmation of the CAST test and determination of both the actual amount of the drug, as well as the exact nature of the drug involved. (Testimony of Dr. Watt, Tr. 193-194)

Upon receipt of the tissue sample, the laboratory checks the tissue to insure that it has not deteriorated as a result of temperature, logs the sample in, giving it an internal serial number, and then repeats the CAST test using the very same procedure that the meat inspector used at the plant. If this second CAST test is also positive, the various tissues are subjected to an extensive test, known as a bio-assay, to determine what drug is present in which tissue, and its concentration. During the entire testing procedure, both in the packing plant itself as well as in the laboratory, extreme caution and attention is given to maintaining the sample's identity so that whatever the results of the tests, they can be related back to the exact calf which was involved. (Testimony of Dr. Chiu, Tr. 58-67)

In actual practice, the Western Laboratory, which was the laboratory where the bio-assays of the Respondent's calves occurred and which is supervised by Dr. Chiu, has a confirmation of positive results of approximately ninety percent (90%), with some months showing confirmations of ninety-five percent (95%) of the samples tested. (Tr. 68)

Both the Food Safety and Inspection Service and the Packers and Stockyards Administration have devoted substantial resources, both in terms of time and money, in implementing, educating the industry, and policing the program to assure its success. Dr. Waguespack testified about the extensive travel that he and other members of the FSIS engaged in, often with the participation of administrative officials of the Packers and Stockyards Administration, to inform market owners, packers, dairy organizations and others of the importance of the program and how it would work. (Tr. 15) Mr. Harold Davis, Director of the Livestock Marketing Division of the Packers and Stockyards Administration, testified of his extensive involvement and time commitment with the program, and the extensive travel he made, as representative of the Packers and Stockyards Administration, in preparation to implement the program nationwide. Kenneth Freeze, Regional Supervisor of the Lawndale, California, office of the Packers and Stockyards Administration, told of distributing the one page flyers as to the various markets affected, and which he wanted them to distribute to their customers, as well as his office spending more than one man-year each year on this program.

Complainant points out that the Food Safety and Inspection Service is aiming for a 1% positive CAST rate, from a high of 7.7% rate, before they are satisfied and willing to consider the program a practical success. There is evidence of record indicating that the number of "certified" calves going to slaughter is decreasing, and, the number of non-certified ones going to slaughter is increasing,—thus reflecting a choice by the industry to choose between the two.

When asked if there was any problem with aminoglycosides, tetracyclines, sulfonamides and other antibiotics, in amounts above the FDA established tolerance levels in meat used for human consumption, in amounts above the FDA established tolerance level, Dr. Judith Weissinger, Pharmacologist with the Residue Evaluation Branch of the Food and Drug Administration's Center for Veterinary Medicine, testified:

These tolerances have been established and the withdrawal periods set in order to maintain the safety of the human food supply.

If you have a situation such as veal calf which is slaughtered at a very early age which has residues, and veal calf meat is used for sausage and hot dogs, all beef hot dogs, veal baby food. . . . an antibiotic residue, . . . such as penicillin. Just a small amount of that penicillin can cause hypersensitivity or allergic reaction. And a baby that is allergic to penicillin could get that in a veal baby food jar. So you'd have to be really sure that these bob veal calves don't have it. (Tr. 96-97)

Dr. Weissinger further testified about the dangers that residues of neomycin, the drug found in the Respondent's calves, above tolerance levels, post to the population:

Well, it's illegal if it's above tolerance. And it's a problem because its a drug which could cause problems in the human population.

For instance, the toxicities associated with neomycin include ototoxicity and nephrotoxicity; and I'll explain those. Nephrotoxicity what happens is the binding to the kidney tissue causes a decrease in kidney function; therefore, there is more of a build-up of neomycin. And that build up could cause an ototoxicity which is damage to the eighth cranial nerve, which ends up being manifested as deafness or a similar imbalance in the motor system . . . the whole population is susceptible but in infants with immature renal function and ability to excrete neomycin; the elderly with their difficulty in renal excretion, again, decreased renal function with age; and anybody with renal disease or any kind of renal compromise would certainly not be as able to excrete neomycin as a healthy person.

But even healthy people bind it to their kidneys as do calves. (Tr. 98-99)

The Respondent high-lights a focal point of controversy—i.e., there is nothing in the published regulations which requires a *written* certification. The Complainant maintains, as Mr. Davis explained, that the Respondent gave a false certification which constitutes a willful violation of Section 312(a) of the Act. Had the Respondent had written certifications from the producers in his records, even though drug residues were found in two calves, Respondent would not have been in violation of the Act.

The Complainant argues that its requirement of written certification is associated with the national program instituted by the Food Safety and Inspection Service of the United States Depart-

ment of Agriculture in cooperation with the Food and Drug Administration, as set forth herein. It is further contended, based upon interpretation and implication, not readily apparent in the published regulations, that a "guarantee" or "certification" is given voluntarily by the producer of the bob Calves which are to be slaughtered, and that a dealer or market agency can "certify" calves as long as the dealer or market agency has the corresponding written certifications, from the actual producers, contained in his books and records. Although the Complainant states this on brief, the testimony is to the contrary. The rules and regulations (Complainant's Exhibit I) are clear that only a producer may certify a calf. There is no provision anywhere in the regulations for certification of calves by anyone other than a producer. That was re-emphasized by MR. WAGUESPACK (Tr. 38)

Q: But suppose that dealer certified the calf, as I understand what you said, that if he didn't treat the calf in any way during the time he had it, he could certify it as to his possession of the calf.

A: He could, but we wouldn't accept it because the certification must come from the producer.

Q: So you wouldn't even rely on it.

A: That's right.

Q: It would be a wasted piece of material.

A: As far as we're concerned, we wouldn't accept it.

It seems that what the Complainant desires, to make its program effective, is to have a certification made by the producer of the calf at birth and thereafter until it is sold. From then on, reliance may be placed on such certification by those who subsequently may have the animal. Any subsequent certification would have to be premised on the original producer's certification.

Mr. Harold Davis, Director of Livestock Marketing Division, United States Department of Agriculture, testified with respect to the position of the Packers and Stockyards Administration, thusly:

"A. We believe that, for a livestock dealer, which Mr. Perry is, to certify that the calves were drug-free for slaughter when he—without the appropriate backup certification from the livestock producers or the dairy-men, is an unfair and deceptive practice under the provisions of 312(a) of the Packers and Stockyards Act in that it permits an animal which may contain a drug residue to be slaughtered without the appropriate sampling and testing requirements set forth in the Regulations under (sic) FSIS, and offers the very real potential of animals moving into the food channels for human consumption which do, in fact, have residue or certain residues without ever having been tested or sampled for residue.

In the case here, we are talking about two calves which had residues; but there is no way of knowing how many calves may have had residues which were not caught because of the certifications which allowed the calves to be slaughtered without being tested." (Tr. 429)

Mr. Davis, after hearing all the testimony, made an assessment of the Respondent's conduct as follows:

"* * * that this type of practice is one which simply demonstrates that the individual involved was exercising a *careless disregard* for the requirements of the program and what the program was attempting to do." (Tr. 430). Emphasis added.

Respondent has set forth arguments relative to the lack of intent to be in violation, recited good faith efforts and intent to comply, extenuating circumstances, and a position that alludes to the lack of specificity as to the manner required for compliance with the program. Since there is no published standard nor regulation requiring a writing, the only way the Respondent would have been aware that an oral statement by the dairy farmers would not suffice, was by reason of his telephone call to Mr. Freeze, which he indicated he did not recall or understand in the same manner as Mr. Freeze, and, the contents of the letter of January 2, 1985, which specifically made reference to the record keeping requirements of Section 401 of the Act.

It is obvious that the program is premised upon implication that the certification must be in writing, but, as testified to by Mr. Davis, it could have been on a tape recording, which became a part

of the Respondent's records. Of course, when standards are less than specific, this gives rise to subjective interpretation and implication, and, possible uncertainty as to what is required for legal compliance. However, in this case, I believe that the Respondent had been adequately advised of the written certification requirements. The record herein does not reflect arbitrary nor capricious action on the part of the Complainant,—it is reasonable to require a certification in writing. Nor, does it show a wanton disregard of the program requirements on the part of the Respondent, but, rather less than a knowledgeable, diligent attempt to comply therewith.

The cumulative evidence herein shows that the Respondent, seventy years old, made an effort to ascertain what he could do to keep out of trouble when he telephoned Mr. Freeze after receiving the letter dated January 2, 1985; that subsequent to January 15, 1985, he has taken steps to maintain the identity of the medicated calves; and, that Mr. Vedder, a Marketing Specialist and investigator, found Mr. Perry "very cooperative". (Tr. 148)

Mr. Singleton, President and owner of Rancho Veal, indicated a business relationship with Respondent of approximately 19 years, and, that he had been buying bob calves from Respondent for slaughter for approximately 4 or 5 years. (Tr. 168). Had Rancho Veal been dissatisfied with the business relationship with Respondent, Rancho Veal could have discontinued buying calves from Respondent, or, could have pursued legal remedy for breach of guaranty.

A majority of the producers from whom the purchases, as herein pertinent, were made, testified. From the Respondent's viewpoint, he had dealt with these same producers-dairymen over a period of years, and had continuously told them to let him know if any calf had been medicated. All the producers who testified so confirmed this understanding with the Respondent. The Respondent testified that on the day in question, he may have failed to ask his usual question relative to medication. He relied upon a past course of conduct, apparently, when he signed the guaranty presented to him by Rancho Veal, which is designated for the producer or auction yard, of which Respondent was neither.

The testimony of the producers corroborates that of the Respondent. Mr. DeKuyer indicated that although the Respondent did not inquire as to medication every time—"He don't have to mention that, because everybody's aware of it." (Tr. 227). Mr. Costa testified that Respondent always asked about medication (Tr. 240), and that slips were signed differentiating between medicated and non-medicated calves. (Tr. 243). Mr. Vandenberg's testimony was that Re-

spondent was "very picky" about calves, and always asked if the calves had been treated, and that when Respondent purchased medicated calves, they were marked, (Tr. 254), although, Respondent usually told Mr. Vandenberg to keep the medicated ones.

Although an affidavit had been obtained ahead of time by the agency from some of the testifying producers, including one from Mr. Vandenberg, it is believed that the live testimony of Mr. Vandenberg as to "marking" of the calves was the more accurate.

The import of the testimony of other testifying producers was substantially the same—that Respondent usually asked if the calves were medicated (Mr. Captein, Tr. 268-274); that in Mr. Simoes case, the receipt showed which calves were medicated, and with respect to the calves purchased from him, Mr. Simoes' calves were treated as medicated calves. (Tr. 289). Mr. Van Exel indicated—"the ones with medication, he (Mr. Perry) don't want them" and, Mr. Van Exel, the same as the other producers, knew which calves had been medicated. (Tr. 325). Similar testimony was given by Kooyman and Mr. Borges.

Apparently, such oral representations and arrangements which Respondent had with the producers were sufficient for him to rely thereon. Circumstances proved that this was an erroneous reliance because two calves showed up with impermissible drug level residues. Perhaps contributing thereto was the failure of Respondent to maintain the identify of the calves, which precluded a meaningful association of "marked" calves with the appropriate producer.

The evidence indicates, through the testimony of Dr. Bennett, a witness for the Respondent, that there are at least five conceivable scenarios by which a calf may possess antibiotic residues at slaughter in a situation where producers have not administered those drugs with prior knowledge or intent. Those situations were described as follows:

1. Milk from medicated cows unknowingly being switched with milk from non-medicated cows.
2. A calf may suckle a cow which has been medicated.
3. It's possible for incidental exposure to calves of antibiotics when employees are treating calves.
4. The opportunity for milk which has been medicated and intended for one calf to contaminate other milk sources.
5. The possibility of a young calf to suckle a cow that has just been recently dry-cow medicated.

As DR. BENNETT went on to state, the problem is compounded in California as follows:

Judge BAKER: “. . . DR. BENNETT, in these various scenarios that you have set forth, namely five, is it true that they could occur without the dairy herd's owner knowing about them?

WITNESS: Yes, particularly California, because the larger farms and the number of employees who are operating without the direct supervision of the dairy owner/operator.

However, it was not shown, by record evidence, that any of the possibilities mentioned by Dr. Bennett happened in this case.

Although Respondent made an effort to understand what was required of him, the evidence indicates that he either did not have a clear understanding as to what was meant by certification being in writing (Tr. 343) and the necessity for identification of the animals, or, he did not make sufficient effort to achieve compliance.

Notwithstanding the above, the Respondent's own testimony is sufficient in itself to establish a violation of Section 312 of the Act, as alleged in the Complaint. Respondent testified that he was told, “* * * before you unload these calves, you'd better certify them.” (Tr. 344, 349)—“Well, they told me it was a new law that I had to sign.” (Tr. 345). Respondent went by the producers' understanding he had with them, and he had no document in this records indicating that the calves were drug free. (Tr. 345, 348). Although the Respondent may have marked medicated calves with chalk on the head or hip, he acknowledged that he did not back tag the animals until after January 15, 1985 (Tr. 353, 362). With respect to the two calves which were condemned from the January 15, 1985, sale, the Respondent did not know the source thereof. (Tr. 375).

When questioned about whether he asked the dairymen on January 14, 1985, whether the calves were medicated, or not, Respondent Perry replied:

“No. I do not remember if I asked all the dairymen on January 14, 1985, if they had given any kind of medication. I could have asked a few of them. But maybe I didn't as (to) them all.” (Tr. 380)

Respondent sums up the situation most accurately himself when he testified regarding the guaranty which he signed, “—But I shouldn't have done it.” (Tr. 343)

The Respondent further contests the Complainant's characterization of Respondent's conduct on January 14, and 15, 1985, as a willful and wanton disregard of the requirements of the Act. According to the Department's interpretation and definition of “willfulness”, the Respondent must be so designated. The Complainant's brief

sets forth the position of the Department of Agriculture as to what is meant by the term "willful". Respondent has not shown why such interpretation is not applicable here.

The meaning of the word "willful" in administrative proceedings brought under the Packers and Stockyards Act is found in numerous cases.

In *In re J.A. Speight*, 33 Agric. Dec. 280, 302 (1974), a case brought under the Packers and Stockyards Act, the Judicial Officer gave the following definition of "willful" within the meaning of the Administrative Procedure Act (5 U.S.C. § 558(c)):

A violation is willful within the meaning of the term in a regulatory statute, if the violator 1) intentionally does an act which is prohibited—irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements (*Goodman v. Benson*, 286 F.2d 896, 900 (C.A. Ky. 1961))

See also *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182 (1972); *In re Rayville Livestock Auction, Inc.*, Agric. Dec. 886, 896 (7th Cir. 9161); *In re Lufkin Livestock Exchange, Inc.*, 27 Agric. Dec. 596, 609 (1968); and *In re Smithfield Livestock Market, Inc.*, Agric. Dec. 1546 (1977).

Although the issue of giving a false calf drug certification is one of first impression before the Secretary, the issue of whether the giving of a false record constitutes an unfair and deceptive practice under section 312(a) of the Act has been decided previously. In both *In re Rayville Livestock Auction, Inc.*, 30 Agric. Dec. 886 (1971); and *In re Red River Livestock Auction, Inc.*, 30 Agric. Dec. 898 (1971), the Judicial Officer held it to be a violation for the Respondents therein to have created and given false records in connection with livestock transactions which concealed the fact that the animals they were selling were either "brucellosis-reactor" or "brucellosis-exposed" animals.

In the present case, the Respondent Perry's actions were contrary to the Act and willful. He intentionally did an act which was prohibited and acted with careless disregard of the statutory requirements after he had been informed of them twice—once by letter and once by oral communication, even though there may have been some confusion and misunderstanding on his part.

Additionally, as further pointed out by Complainant on brief, the contentions of Respondent that his actions were not willful, as that term is used by the Department of Agriculture under its regulatory statutes, have been considered at length and rejected.

The case of *In re: James J. Miller*, 33 A.D. 53 (1974), sets forth a thorough explanation of the meaning of the term "willful". In part, it is stated:

A violation is wilful, within the meaning of the term in a regulatory statute, if the violator "1) intentionally does an act which is prohibited,—irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard to statutory requirements." *Goodman v. Benson*, 286 F.2d 896, 900 (C.A. 7, 1961). *Accord, United States v. Illinois Cent. R. Co.*, 303 U.S. 239, 242-44 (1938); *Gearhart & Otis, Inc. v. Securities & Exch. Com'n.*, 348 F.2d 798, 802-803 (C.A.D.C., 1965); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (C.A. 3, 1960); *Riss & Company v. United States*, 262 F.2d 245, 247-251 (C.A. 8, 1958); *United States v. Gris*, 247 F.2d 860, 864 (C.A. 2, 1957); *Trenton Chemical Co. v. United States*, 201 F.2d 776, 777-780 (C.A. 6, 1953), *cert. denied*, 345 U.S. 994; *Dennis v. United States*, 171 F.2d 986, 990-91 (C.A.D.C., 1948), affirmed on other grounds, 339 U.S. 162 (1950); *American Surety Co. v. Sullivan*, 7 F.2d 605, 606 (C.A. 2, 1925); *Chicago, St. P., M. & O. Ry. Co. v. United States*, 162 F. 835, 840-942 (C.A. 8, 1908), *cert. denied*, 212 U.S. 579; *Schwebel v. Orrick*, 153 F. Supp. 701, 705 (D.C.D.C., 1957), affirmed on other grounds, 251 F.2d 919 (C.A.D.C., 1958), *cert. denied*, 356 U.S. 927; *In re David G. Henner*, 30 Agric. Dec. 1151, 1260-1263 (1971); *In re American Fruit Purveyor's, Inc.*, 30 Agric. Dec. 1542, 1587 (1971). *See, also, Great Western Food Distributors v. Brannan*, 201 F.2d 476, 484 (C.A. 7, 1953), *cert. denied*, 345 U.S. 997.

Wilfulness means "no more than that the person charged with the duty knows what he is doing," and it "does not mean that, in addition, he must suppose that he is breaking the law." *Townsend v. United States*, 95 F.2d 352, 358 (C.A.D.C., 1938), *cert. denied*, 303 U.S. 664; *Fields v. United States*, 164 F.2d 97, 100 (C.A.D.C., 1947), *cert. denied*, 332 U.S. 851. It is only in statutes involving turpitude that "wilful" includes evil purpose, criminal intent, or the like. *Spies v. United States*, 317 U.S. 492, 497-499 (1943).

In *Trenton Chemical Co. v. United States*, 201 F.2d 776, 777-780 (C.A. 6, 1953), *cert. denied*, 345 U.S. 994, the Court held that a company which exceeded its quota, under a regulatory order establishing quotas as to grain used by

distillers, "wilfully" violated the quota restriction, subjecting it to criminal prosecution. The defendant contended that it used grain products, not grain, and "that it had been advised by its attorney that it was not illegal to use grain products in its distilling operations," but the "District Judge declined to permit the * * * [Company] to show at the trial that it acted in good faith and on advice of counsel that its acts were not illegal, in using the materials in question" (201 F.2d at 778, 779). In sustaining the judgment of the District Court, the Court of Appeals held that inasmuch as the regulatory statute did not prescribe acts "in themselves wrong," evidence of "bad faith or evil purpose on the part of the defendant was not necessary to constitute a violation of the act, but it was sufficient if the prohibited act was intentional or voluntary" (201 F.2d at 780).

Similarly, in *Chicago, St. P., M. & Co. Ry. Co. v. United States*, 162 F. 835, 840-842 (C.A. 8, 1908), *cert. denied*, 212 U.S. 579, the Court upheld the conviction of the defendants under the Elkins Act on the ground that they "willfully" granted rebates to a shipper, notwithstanding the reliance by the defendants on decisions by the Interstate Commerce Commission which, according to the Court, "might well have afforded ground for belief by defendants that their act * * * was justifiable and lawful" (162 F. at 840-41). The Court said that to "hold that the belief of an individual concerning the legality of his action should constitute a standard of innocence or guilt would establish an uncertain and dangerous doctrine. It would in many cases justify a violation of statutes expressive of public policy concerning which there may obviously be and frequently are as many different opinions as there are different individuals affected by them" (*id.*, at 842). *See also*, *Sinclair v. United States*, 279 U.S. 263, 299 (1929); *Armour Packing Co. v. United States*, 209 U.S. 56, 70-71, 85-86 (1908); *United States v. Union Pac. R. Co.*, 169 F. 65, 67 (C.A. 8, 1909).

It was held in *Dennis v. United States*, 171 F.2d 986, 990-991 (C.A.D.C., 1948), affirmed on other grounds, 339 U.S. 162 (1950), that in order to prove a wilful failure to appear before a Congressional Committee, it is not necessary to show that the act of refusal was done from a bad purpose or an evil motive. The Court held that the mere fact that

the defendant claimed to have followed the advice "is no defense," and that "[i]f it were, many corporations, organizations and even individuals would maintain counsel permanently for the purpose of advising them against doing anything that they do not wish to do" (171 F.2d at 991).

Thus, the Respondent's actions were willful under the Act, as that term is defined by the Secretary.

The Act vests in the Secretary authority to impose sanctions with a view to enforcement of his statutory and regulatory mandates. This is carried out, in these administrative, disciplinary cases through the Agency and by the Secretary's Judicial Officer. The exercise of their discretion with respect to the imposition of sanctions is accorded deference by the courts, which recognize that choice of a sanction is peculiarly a matter for administrative competence. *Butz v. Glover Livestock Commission Co., Inc.*, 411 U.S. 182 (1972); *F.T.C. v. Universal-Rundle Corp.*, 387 U.S. 244 (1967).

As both parties are aware, the sanction sought by the Complainant is well within the statutory limits. However, it is not without reason to consider the Respondent's argument that the imposition of a \$5000. penalty is not justified on the facts, even though the Complainant may want to make an example of the Respondent to shore up a program, which, admittedly, until mid 1984, was not accomplishing what it set out to do. This is a case of initial impression. Accordingly, I believe that any change in the requested sanction should be made by the Judicial Officer, on appeal.

In the *Glover* case, *supra*, the United States Supreme Court was explicit when it stated that the breadth of the grant of authority to the Secretary to impose sanctions strongly implies a congressional purpose to permit the Secretary to make such imposition to deter repeated violations of the Act, whether intentional or negligent. When the Secretary's practice is to employ a sanction which, in his judgment, best serves to deter violations and achieve the objectives of the statute, then such choice of remedy is not to be overturned unless unwarranted in law or without justification in fact.

Respondent Perry has shown no illegality associated with the Complainant's requested sanction, which is warranted in both law and fact.

The reason for the requested Cease and Desist Order, and, the \$5000. sanction was explained by Mr. Davis in his testimony, after having listened to the testimony of Respondent Perry, on the stand.

Q Why does the Administration seek such a civil penalty and a cease and desist order?

A The civil penalty, in this case, is based, at least in part, on what we believe is a necessary deterrent effect, not only for Mr. Perry, but for the industry as a whole, to recognize and understand that the false certification or the certification without the background and without the knowledge of whether or not an animal has been treated—we believe that the civil penalty must be of an amount sufficient that the industry will set up and take notice that this is a problem and that a person who does do this can and will be appropriately prosecuted under the law, so that the industry is served affective notice that, if they are to sign a certification, they must know what they are signing and they must treat it as a serious matter.

And the Administration believes that anything short of a significant civil penalty simply will not serve the notice that is necessary and will not provide the deterrent effect that is needed to address the problems in the residue program.

As further justification for the requested sanction, Complainant makes reference to the Consent Order agreed to in the *Van der Geest & Sons, Inc.*, case, P. & S. Docket No. 6484 (December 26, 1985) wherein a \$4000. civil penalty was imposed. This is the only other administrative case cited by the Complainant on the "same issue". I agree with the Respondent that such case is lacking in precedential value herein. At best, the facts in the *Van der Geest* case have to be derived from a reading of the Complaint therein. Also, it is not known what matters were discussed and were a part of the negotiating process. From a reading of the Complaint therein, it would appear that *Van der Geest* is a rather large business since it is a corporation, whereas the Respondent is a single person characterized by Complainant as a small operation. Also, the Complaint against the Respondent here deals with one violation, whereas, in *Van der Geest*, there were four or more alleged violations. Another most important difference is that the Complaint in *Van der Geest* charges the corporate respondent therein with actually administering drugs and consigning the calves for sale without waiting for the withdrawal period, a clear violation of the calf certification program. At no time was Respondent Perry charged with administering drugs or has there been any implication that he affirmatively caused drug residues. On this, and other contentions, the Respondent argues for a nominal penalty or at least one less than that sought by the Complainant. Under the circumstances, such a request can not be granted by the Administrative Law Judge, who

is not the policy maker for program sanctions within the United States Department of Agriculture. That is a matter which the Judicial Officer has emphatically and clearly addressed in his many decisions. The Department's sanction policy has been reiterated in two recent cases: *Corn State Meat Company, Inc., et al*, P & S Docket No. 6427 (May 8, 1986); and, *Holiday Food Services, Inc.*, P & S Docket No. 6488 (May 8, 1986).

A consideration of the record as a whole indicates that Complainant did consider the size of the Respondent's business, Respondent's testimony at the hearing, his ability to pay the sanction, and the necessity therefor, in order to deter the Respondent and others in the industry from permitting calves with drug residues entering into the current of commerce without the proper safe-guards.

The Complainant has shown a rational and considered relationship between the sanction sought and the seriousness of the violation.

Accordingly, the Order below is issued:

ORDER

Respondent Manuel Perry, individually or through any corporate or other device, in connection with activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Preparing and issuing certifications or any other documents which state that drugs have not been administered to livestock, or that if drugs have been administered to livestock that the withdrawal period specified on the drug label has been followed, unless Respondent knows from his own personal knowledge that such facts are true or has received signed statements from the producer of said livestock that drugs have not been administered to livestock, or that if drugs have been administered to livestock that the withdrawal period specified on the drug label has been followed; and

2. Representing in any manner to purchasers of livestock, to agents or employees of such purchasers, or to any other persons involved in the marketing or slaughter of livestock, that drugs have not been administered to livestock, or that if drugs have been administered to livestock, the withdrawal periods specified on the drug labels have been followed, when such representations are incorrect.

Respondent shall keep accounts, records and memoranda that fully and correctly disclose all transactions involved in his business as a market agency and dealer subject to the Act, including written statements from producers that certify that the calves which are sold to Respondent have not been treated with animal drugs or, if

so treated, the withdrawal period as prescribed on the drug's label has passed. Respondent shall keep such memoranda for all calves which he sells or consigns to a packer or other person and so certifies or guarantees the same to the packer or other person.

In accordance with Section 312(b) of the Act (7 U.S.C., section 213(b)), Respondent Perry is assessed a civil penalty in the amount of Five Thousand Dollars (\$5000.00).

All contentions, requests, motions, and otherwise of the parties have been duly considered, and, to the extent, if any, not ruled upon and which may be inconsistent with this Decision and Order, they are hereby denied.

This Decision and Order shall become final thirty-five days after service thereof unless appealed to the Secretary's Judicial Officer within thirty days, as set forth in the Rules of Practice and Procedure, 7 CFR sec. 1.131, *et seq.*

Copies hereof shall be served upon the parties.

[The Decision and Order became final on October 20, 1986.—Ed.]

In re: CRAIG LANDEEN. P&S Docket No. 6626. Decided October 21, 1986.

William A. Weber, Administrative Law Judge.

Andrew Stanton, for complainant.

Pro se, for respondent

Decision by Donald A. Campbell, Judicial Officer.

RULING ON CERTIFIED QUESTION

On October 17, 1986, Judge William J. Weber certified to the Judicial Officer the question as to whether adequate service was made on respondent of the complaint and proposed default decision.

The complaint alleges that respondent engaged in business as a market agency, buying livestock in commerce on a commission basis, without being registered with the Secretary or furnishing the required bond. The complaint further alleges that during June and July 1985, respondent purchased livestock and failed to pay approximately \$17,614.57 for his livestock purchases.

The complaint was sent to respondent's last known address by certified mail, but was returned as "Unclaimed." Thereafter, the Hearing Clerk sent a copy of the complaint to respondent at the same address by regular mail, which was also "Unclaimed." The Motion for Adoption of Proposed Decision was sent by certified

mail to respondent at the same address, but the envelope was returned marked "MOVED, LEFT NO ADDRESS." (The return receipt card for this document shows that it was received by "Stewart," who is not identified in the file.) Thereafter, the Hearing Clerk sent the Motion for Adoption of Proposed Decision to respondent at the same address by regular mail, but the letter was returned marked "NOT DELIVERABLE AS ADDRESSED—UNABLE TO FORWARD."

Service by regular mail after respondent failed to accept delivery (i.e., failed to pick up the documents at his post office box or leave a forwarding address) complies with the Department's rules of practice, and meets the requirements of due process. The rules of practice provide (7 CFR § 1.147(b)):

(b) *Service; proof of service.* Copies of all such documents or papers required or authorized by the rules in this part to be filed with the Hearing Clerk shall be served upon the parties by the Hearing Clerk, or by some other employee of the Department, or by a U.S. Marshal or deputy marshal. Service shall be made either (1) by delivering a copy of the document or paper to the individual to be served or to a member of the partnership to be served, or to the president, secretary, or other executive officer or any director of the corporation or association to be served, or to the attorney of record representing such individual, partnership, corporation, organization, or association; or (2) by leaving a copy of the document or paper at the principal office or place of business or residence of such individual, partnership, corporation, organization, or association, or of the attorney or agent of record and mailing by regular mail another copy to such person at such address; or (3) by *registering or certifying and mailing a copy of the document or paper, addressed to such individual, partnership, corporation, organization, or association, or to the attorney or agent of record, at the last known residence or principal office or place of business of such person: Provided, That if the registered or certified document or paper is returned undelivered because the addressee refused or failed to accept delivery, the document or paper shall be served by re-mailing it by regular mail.* Proof of service hereunder shall be made by the certificate of the person who actually made the service: *Provided, That if the service be made by mail, as outlined in paragraph (b)(3) of this section, proof of service shall be made by the return post-office receipt, in the*

case of registered or certified mail, or by *the certificate of the person who mailed the matter by regular mail*. The certificate and post-office receipt contemplated herein shall be filed with the Hearing Clerk, and made a part of the record of the proceeding. [Emphasis added.]

To meet the requirement of due process of law, it is only necessary that notice of a proceeding be sent in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). And see *NLRB v. Clark*, 468 F.2d 459, 463-65 (5th Cir. 1972); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. ____ (Sept. 23, 1985).

The Department's rules of practice providing for service by certified mail addressed to respondent's last known place of business, followed here, meet the requirement of due process of law. As held in *Stateside Machinery Co., Ltd. v. Alperin*, 591 F.2d 234, 241-42 (3d Cir. 1979):

Whether a method of service of process accords an intended recipient with due process depends on "whether or not the form of . . . service [used] is *reasonably calculated* to give him actual notice of the proceedings and an opportunity to be heard." *Milliken*, 311 U.S. at 463, 61 S.Ct. at 343 (emphasis added); see *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S.Ct. 652, 94 L.Ed. 865 (1950). As long as a method of service is reasonably certain to notify a person, the fact that the person nevertheless fails to receive process does not invalidate the service on due process grounds. In this case, Alperin attempted to deliver process by registered mail to defendant's last known address. That procedure is a highly reliable means of providing notice of pending legal proceedings to an adverse party. That Speigel nevertheless failed to receive service is irrelevant as a matter of constitutional law. [Omission and emphasis in original.]

A person who engages in the highly regulated livestock industry as a market agency or dealer has an obligation to register with the Secretary on forms which include his address (7 U.S.C. § 203; 9 CFR § 201.10).

Prior to 1984, the regulations expressly required market agencies and dealers to report any change of address within 10 days after making such change (9 CFR § 201.13 (1984)). This regulation was removed effective September 19, 1984 (49 Fed. Reg. 33,001, 33,003

(1984)). However, the regulation was removed only because under normal circumstances the agency could obtain the information from other sources. In the notice of proposed rule making with respect to the removal of 9 CFR § 201.13, the Administrator states (47 Fed. Reg. 20,311, 20,312 (1982)):

The proposed removal of regulation 201.13, which presently requires registrants to report any change in name, address, management or control, would ease current industry reporting requirements. This information can be obtained from annual reports, state agencies and from other industry sources, and the removal of this regulation will not adversely affect the agency's ability to enforce the Act.

If a market agency or dealer changes his address without leaving forwarding information with anyone, he has no one but himself to blame if he fails to receive important legal documents. Accordingly, the proposed default decision and order should be issued.

In re: ROSS CATTLE CO., INC. and WILLIAM W. ROSS, ROBERT L. KLEINPETER, JOHN MOUSLEY YATES, BENNY MASON VINE, JR., LEE M. JOHNSON, and LEWIS T. MCCOY. P&S Docket No. 6676. Decided October 21, 1986.

John Campbell, Administrative Law Judge.

Jory Hochberg, for complainant.

Daniel Olsen, Kansas City, Mo., for respondent Robert L. Kleinpeter.

CONSENT DECISION WITH RESPECT TO ROBERT L. KLEINPETER

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Robert L. Kleinpeter admits the jurisdictional allegations in paragraph II of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations as they pertain to him, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Robert L. Kleinpeter is an individual doing business as R. L. Kleinpeter Cattle Co. whose business mailing address is 8867 Highland Road, Suite 135, Baton Rouge, Louisiana 70808.

2. Respondent Kleinpeter is, and at all times material was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock for his own account.

CONCLUSIONS

Respondent Robert L. Kleinpeter having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Robert L. Kleinpeter, directly or indirectly, through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock;

2. Failing to mail checks issued in payment for livestock before the close of the next business day following purchase of such livestock; and

3. Engaging in any other device to delay payment for livestock or which delays the collection of funds tendered in payment for livestock purchases.

Robert L. Kleinpeter is suspended as a registrant under the Act for a period of 28 days.

The provisions of this order shall become effective on November 16, 1986 after service of this decision upon the parties.

Copies of this decision shall be served upon the parties.

In re: ROSS CATTLE, INC., and WILLIAM W. ROSS, ROBERT L. KLEIN-PETER, JOHN MOUSLEY YATES, BENNY MASON VINE, JR., LEE M. JOHNSON, and LEWIS T. MCCOY. P&S Docket No. 6676. Decided October 21, 1986.

John Campbell, Administrative Law Judge

Jory Hochberg, for complainant

Daniel Olsen, Kansas City, Mo., for respondent John Mousley Yates

CONSENT DECISION WITH RESPECT TO JOHN MOUSLEY YATES

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent John Mousley Yates admits the jurisdictional allegations in paragraph III of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations as they pertain to him, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

(a) John Mousley Yates is an individual doing business as John Yates Cattle Co. whose business address is Route 4, Box 434, Franklinton, Louisiana 70438.

(b) Respondent John Mousley Yates is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

Respondent John Mousley Yates, having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, John Mousley Yates, directly or indirectly, through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock;

2. Failing to mail checks issued in payment for livestock before the close of the next business day following purchase of such livestock; and

3. Engaging in any other device to delay payment for livestock or which delays the collection of funds tendered in payment for livestock purchases.

Respondent Yates is suspended as a registrant under the Act for a period of 28 days.

The provisions of this order shall become effective on November 16, 1986.

Copies of this decision shall be served upon the parties.

In re: ROSS CATTLE CO., INC., and WILLIAM W. ROSS, ROBERT L. KLEINPETER, JOHN MOUSLEY YATES, BENNY MASON VINE, JR., LEE M. JOHNSON, and LEWIS T. MCCOY. P&S Docket No. 6676.
Decided October 21, 1986.

John Campbell, Administrative Law Judge.

Jory Hochberg, for complainant.

Richard Fitzpatrick, Poplarville, MS., for respondents Johnson and McCoy.

CONSENT DECISION WITH RESPECT TO LEE M. JOHNSON AND LEWIS T.
MCCOY

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondents Johnson and McCoy admit the jurisdictional allegations in paragraph V of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations as they pertain to them, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Lee M. Johnson and Lewis T. McCoy are partners doing business as Big Spring Cattle whose business mailing address is Box 324, Picayune, Mississippi 39466.

2. Respondents Johnson and McCoy are, and at all times material herein were:

(a) Engaged in the business of buying and selling livestock in commerce for their own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for their own account.

CONCLUSIONS

Respondents Johnson and McCoy having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Lee M. Johnson and Lewis T. McCoy, directly or indirectly, through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock;

2. Failing to mail checks issued in payment for livestock before the close of the next business day following purchase of such livestock; and

3. Engaging in any other device to delay payment for livestock or which delays the collection of funds tendered in payment for livestock purchases.

Lee M. Johnson and Lewis T. McCoy are suspended as registrants under the Act for a period of 28 days.

The provisions of this order shall become effective on November 16, 1986.

Copies of this decision shall be served upon the parties.

In re: JACK S. TAYLOR. P&S Docket No. 6727. Decided October 23, 1986.

Victor Palmer, Administrative Law Judge.

Ben Bruner, for complainant

Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jack S. Taylor, hereinafter referred to as the respondent, is an individual whose business mailing address is P. O. Box 846, Burley, Idaho 83318.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account, and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Jack S. Taylor, his agents and employees, directly or through any corporate or other device, shall cease and desist from

engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Insofar as respondent is now in compliance with the bonding requirements under the Act and the regulations, no suspension is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Three Thousand Dollars (\$3,000.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: LEONARD & HARRAL PACKING CO., INC., d/b/a L&H PACKING COMPANY. P&S Docket No. 6723. Decided October 27, 1986.

Victor W. Palmer, Administrative Law Judge.

Edward Silverstein, for complainant.

Michael W. Fox, San Antonio, Texas, for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Leonard & Harral Packing Co., Inc., doing business as L & Packing Company (hereinafter "respondent") is a corporation whose business mailing address is P. O. Box 14514, San Antonio Texas 78214.

2. Respondent is, and at all material times herein was:

(a) Engaged in the business of buying and selling livestock in commerce for purposes of slaughter, and manufacturing or preparing meats or meat food products for sale of shipment in commerce; and

(b) A packer within the meaning of the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Leonard & Harral Packing Co., Inc., d/b/a L & H Packing Company, its successors and assigns, its officers, directors, agents and employees, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock; and

2. Issuing drafts in payment for livestock purchased on a cash basis.

In accordance with section 203(b) of the Act (7 U.S.C. 193(b)), the respondent is assessed a civil money penalty in the amount of Ten Thousand Dollars (\$10,000.00).

The provisions of this order shall become effective on the first day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

*In re: W.A. GREEN LIVESTOCK CO., INC. and W.A. GREEN. P&S
Docket No. 6605. Decided October 30, 1986.*

Victor Palmer, Administrative Law Judge.

Dennis Becker, for complainant.

Richard C. Stamper, El Centro, Calif., for respondent.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the corporate respondent does not meet the requirements of the Act, and that the respondents have wilfully violated the Act. This deci-

sion is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. W. A. Green Livestock Co., Inc., hereinafter referred to as the corporate respondent, is a corporation organized and existing under the laws of the State of California, with its principal place of business located at Davis, California. The corporate respondent's business mailing address is P. O. Box 486, Davis, California 95617.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for its own account and for the account of others; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

3. W. A. Green, hereinafter referred to as the individual respondent, is an individual respondent whose business mailing address is P. O. Box 486, Davis, California 95617.

4. The individual respondent is, and at all times material herein was:

(a) Owner and Vice President of the corporate respondent;

(b) Responsible for the direction, management and control of the corporate respondent; and

(c) Not registered with the Secretary of Agriculture.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent W. A. Green Livestock Co., Inc., its officers, directors, agents, employees, successors and assigns, and respondent W. A. Green, directly or through any corporate or other device, in connection with their business operations as a dealer or market agency, shall cease and desist from:

1. Engaging in business while insolvent, *i.e.*, while current liabilities exceed current assets;

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

3. Failing to pay, when due, the full purchase price of livestock; and

4. Failing to pay the full purchase price of livestock.

Respondent W. A. Green Livestock, Inc., is suspended as a registrant under the Act for a period of 60 days and thereafter until it demonstrates that it is no longer insolvent. When respondent W. A. Green Livestock, Inc., demonstrates that it is no longer insolvent, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the 60-day period.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: ROSS CATTLE CO., INC., and WILLIAM W. ROSS, ROBERT L. KLEINPETER, JOHN MOUSLEY YATES, BENNY MASON VINE, JR., LEE M. JOHNSON, and LEWIS T. MCCOY. P&S Docket No. 6676.
Decided October 31, 1986.

John A. Campbell, Administrative Law Judge.

Jory Hochberg, for complainant.

Donald Walsh, Liberty, MS., for respondent Benny Mason Vine, Jr.

CONSENT DECISION WITH RESPECT TO BENNY MASON VINE, JR.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Benny Mason Vine, Jr. admits the jurisdictional allegations in paragraph IV of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations as they pertain to him, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Benny Mason Vine, Jr. is an individual doing business as Mason Vine Cattle Company whose business mailing address is P. O. Box 815, Centerville, Mississippi 39631.

2. Respondent Vine is, and at all times material was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock for his own account.

CONCLUSIONS

Respondent Benny Mason Vine, Jr. having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Benny Mason Vine, Jr., directly or indirectly, through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock;

2. Failing to mail checks issued in payment for livestock before the close of the next business day following purchase of such livestock; and

3. Engaging in any other device to delay payment for livestock or which delays the collection of funds tendered in payment for livestock purchases.

Benny Mason Vine, Jr. is suspended as a registrant under the Act for a period of 14 days.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent Vine is assessed a civil penalty in the amount of Five Thousand Dollars (\$5,000.00).

The provisions of this order shall become effective on November 9, 1986.

Copies of this decision shall be served upon the parties.

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: CACHE VALLEY AUCTION, INC., DAVID W. BECKSTEAD, and
EDDIE S. JENSEN. P&S Docket No. 6203. Order issued October 1,
1986.

Victor Palmer, Administrative Law Judge.

Peter Train, for complainant.

Dallin J. Phillips, Presto, Idaho, for respondent.

SUPPLEMENTAL ORDER

On September 4, 1984, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent Cache Valley Auction, Inc., as a registrant under the Act for a period of fourteen days and thereafter until it demonstrates that the deficit in its custodial account for shippers' proceeds has been eliminated and that it is no longer insolvent.

Cache Valley Auction, Inc., has demonstrated that it is currently solvent and that it has corrected the deficit in its custodial account. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued September 4, 1984, is terminated. The order shall remain in full force and effect in all other respects.

In re: JIMMY HIGGINS. P&S Docket No. 6589. Order issued October
7, 1986.

William J. Weber, Administrative Law Judge.

Ben Bruner, for complainant.

D. Russell Thomas, Murfreesboro, Tn., for respondent.

SUPPLEMENTAL ORDER

On August 27, 1986, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act until he complied fully with the bonding requirements under the Act and the regulations.

Respondent is now in full compliance with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued August 27, 1986, is terminated. The order shall remain in full force and effect in all other respects.

In re: JOHN A. SCHOLL. P&S Docket No. 6684. Order issued October 7, 1986.

William Weber, Administrative Law Judge
Roberta Swartzendruber, for complainant.
Pro se, for respondent

SUPPLEMENTAL ORDER

On June 13, 1986, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations.

Respondent has now complied fully with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued June 13, 1986, is terminated. The order shall remain in full force and effect in all other respects.

In re: BOBBY M. HACKER. P&S Docket No. 6658. Order issued October 15, 1986.

William Weber, Administrative Law Judge.
Jory Hochberg, for complainant
Pro se, for respondent.

SUPPLEMENTAL ORDER

On September 18, 1986, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act until such time as he filed and maintained an adequate surety bond or its equivalent as required by the Act and the regulations.

Respondent has now filed an adequate bond or its equivalent as required by the Act and the regulations. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued September 18, 1986, is terminated. The order shall remain in full force and effect in all other respects.

In re: GRO-TEX INVESTMENTS, INC., and RUSSEL I. DECORDOVA. P&S
Docket No. 6670. Order issued October 17, 1986.

John A. Campbell, Administrative Law Judge.

Peter Train, for complainant.

Pro se, for respondent.

SUPPLEMENTAL ORDER

On August 27, 1986, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent DeCordova as a registrant under the Act and prohibited respondent Gro-Tex Investments, Inc., from operating subject to the Act until such time as they comply fully with the bonding requirements under the Act and the regulations.

Respondents have now provided the required bonding coverage. Accordingly,

IT IS HEREBY ORDERED that the suspension and prohibition provisions of the order issued August 27, 1986, are terminated. The order shall remain in full force and effect in all other respects.

In re: GRANT OTIS. P&S Docket No. 6223. Order issued October 28, 1986.

Victor W. Palmer, Administrative Law Judge.

Thomas C. Heinz, for complainant.

Pro se, for respondent.

SUPPLEMENTAL ORDER

On December 30, 1983, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations.

Respondent is now in full compliance with the bonding requirements of the Act and the regulations. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued, is terminated. The order shall remain in full force and effect in all other respects.

REPARATION DECISIONS

MITCHELL LIVESTOCK AUCTION CO., v. DANIEL LAMMERS, STANLEY SCHMIDT, and Larry Ryken d/b/a YANKTON LIVESTOCK AUCTION MARKET; and DANIEL LAMMERS v. LARRY RYKEN d/b/a YANKTON LIVESTOCK AUCTION MARKET. P&S Docket No. 5996. Decided September 19, 1986.

Insufficient funds check—Failure to deposit proceeds—Dismissal.

Directed Larry Ryden d/b/a Yankton Livestock Auction Market, to pay Mitchell Livestock Auction Co, \$45,334.58 plus interest at a 13% rate until paid. Daniel Lammers had issued an insufficient funds check to pay for livestock bought from Mitchell Livestock, but Ryden caused the insufficient funds check by wrongfully failing to remit to Lammers the proceeds generated by Ryden's resale of the same livestock. Lammers complaint against Ryden dismissed.

Judicial Officer, Donald Campbell

Burleigh E. Boldt, for complainant Mitchell Livestock Auction Co.

Carleton R. Hay, for complainant Daniel Lammers.

Robert M. Cook, for respondents.

DECISION AND ORDER

PRELIMINARY STATEMENT

These are two reparation proceedings under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 181 *et seq.*) (hereinafter "the Act"), begun by complaints filed by Mitchell Livestock Auction, Inc. (hereinafter "Mitchell"), on November 24, 1981, and by Daniel Lammers (hereinafter "Lammers") on September 22, 1981. Taken together, the complaints alleged in substance that Lammers issued an insufficient funds check to pay for livestock purchased from Mitchell by Lammers and Stanley Schmidt (hereinafter "Schmidt"), and that Larry Ryken d/b/a Yankton Livestock (hereinafter "Ryken") caused the insufficient funds check by wrongfully failing to remit to Lammers the proceeds generated by Ryken's resale of the same livestock. Mitchell sought reparation of \$45,334.58 from Lammers, Schmidt and Ryken. Lammers' reparation claim against Ryken was for \$52,634.14, later reduced to \$49,404.13.

Copies of the complaints and the investigation reports prepared by the Packers and Stockyards Administration were served on the respondents who duly filed answers. Lammers admitted owing Mitchell the amount claimed. Schmidt filed a general denial. Ryken denied the allegations in both complaints, alleged a cross-claim in Docket No. 5994 against Lammers and Schmidt for \$3,259.67, arising out of unspecified transactions, and an identical counterclaim against Lammers in Docket No. 5996 for the same amount. Ryken later abandoned his cross-claim against Schmidt

and at hearing increased his counterclaim against Lammers to \$32,853.47. In his answers to the complaints, Ryken also alleged Iowa Beef Processors, Inc., of Dakota City, Nebraska (hereinafter "IBP"), to be an indispensable party to these proceedings and requested leave to file a cross-claim against that company. The request was not granted since the Act does not give the Secretary jurisdiction to order a packer to pay reparation, and IBP is a packer (7 U.S.C. §§ 209, 210).

As a result of decisions by a South Dakota Circuit Court involving Mitchell, IBP, Ryken, Lammers and Schmidt, on December 27, 1984, Mitchell withdrew its complaint in Docket No. 5994 against Lammers and Schmidt, thereby resting its entire claim against Ryken.

Pursuant to respondents' requests for an oral hearing, a hearing was held on March 19, 1985, in Sioux Falls, South Dakota, before Thomas C. Heinz of the Office of the General Counsel of this Department. Mitchell was represented by Burleigh E. Boldt, Esquire, of Mitchell, South Dakota. Lamers was represented by Carleton R. Hoy, Esquire, of Sioux Falls, and Ryken was represented by Robert M. Cook, Esquire, Norfolk, Nebraska. Six witnesses testified. Mitchell introduced two exhibits, and Ryken introduced eleven exhibits into the record. Briefing by the parties was completed on July 15, 1985.

FINDINGS OF FACT

1. Mitchell is a corporation which at all times material herein was engaged in business as a dealer buying and selling livestock in commerce for its own account and as a market agency selling livestock in commerce on a commission basis at a posted stockyard at Mitchell, South Dakota, and is so registered with the Secretary of Agriculture under the Act.

2. Lammers is an individual who at all times material herein was engaged in business as a dealer buying and selling livestock in commerce for his own account and for the account of others with his principal place of business located at Fordyce, Nebraska.

3. Ryken is an individual who at all times material herein was engaged in business as a dealer buying and selling livestock in commerce for his own account and as a market agency selling livestock in commerce on a commission basis at a posted stockyard with the name "Yankton Livestock Auction Market" at Yankton, South Dakota, and is so registered with the Secretary under the Act.

or 1980 until September 1, 1981, Lammers was as a field man soliciting cattle to be sold at

Ryken's Yankton Livestock Auction Market. During that period Lammers also purchased livestock in his own name at various locations and consigned them to Ryken for resale. In addition, Lammers regularly purchased livestock from Ryken which he sold to IBP on a grade and yield basis.

5. On August 19, 1981, Lammers bought 109 head of livestock from Mitchell for \$53,229.92 and issued a personal check to pay for them. At the time Lammers wrote this check he knew he did not have enough money in his account to cover it. Lammers' consigned all but one of these livestock to Ryken who two days later, on August 21, 1981, sold them at auction for \$52,364.60 net, which amount Ryken has not remitted to Lammers.

6. Lammers told Ryken on August 25, 1981, that he had to have the proceeds from the August 21 sale in order to cover the check he had written to pay for the livestock purchased from Mitchell on August 19, 1981.

7. On August 26, 1981, Lammers bought 188 head of livestock from Mitchell for \$93,285.08 and issued a personal check to pay for them. At the time Lammers wrote this check he knew he did not have enough money in his account to cover it. Two days later, on August 28, 1981, Lammers consigned 141 head of these livestock to Ryken who sold 112 head at auction for \$51,180.42 and issued a check in that amount on his custodial account for shippers' proceeds. On Lammers' instructions, this check was issued to Schmidt, Lammers' uncle and sometime business partner. The remaining 29 head out of the 141 consigned by Lammers were not sold by Ryken but were disposed of elsewhere and are not in controversy here.

8. On September 1, 1981, Mitchell was informed by Lammers' bank that the check Lammers had written on August 19, 1981, was being returned because of insufficient funds. Mitchell immediately contacted Lammers to discuss payment for both his August 19 purchase and his August 26 purchase, since it was clear that Lammers' August 26 check was also going to be returned for insufficient funds. (Both checks indeed were later returned by the bank.) Mitchell and Lammers agreed to meet on September 2, 1981.

9. On September 1, 1981, Lammers' employment with Ryken ended when they met to settle their accounts with each other. Ryken claimed Lammers owed him \$91,303.22 but Lammers disagreed. Lammers again told Ryken that he had to have the proceeds check from the August 21 sale to pay Mitchell for the purchase of the livestock on August 19, and although Ryken issued a proceeds check in the correct amount, \$52,364.60, Ryken said he wanted it endorsed back to cover an insufficient funds check for \$3,620.00 Lammers had issued earlier to Ryken. Lammers testified

that he complied with Ryken's request on the strength of Ryken's promise that he would issue another proceeds check reduced by \$3,620.00. Ryken did not do so, and instead applied the entire \$52,364.60 proceeds check to reduce the \$91,303.22 debt he claimed Lammers owed him as a result of Lammers' various livestock purchases. Lammers also testified that Ryken said "he could give a God damn if Ray Henderson [Mitchell's owner] ever got his money."

10. When Mitchell and Lammers met on September 2, 1986, the Ryken check for \$51,180.42 which had been issued to Schmidt was endorsed over to Mitchell to reduce Lammers' debt for the August 19 and August 26 purchases. The debt was reduced another \$50,000.00 through a bank money order delivered to Mitchell the following day, leaving \$45,334.58 unpaid. No part of this amount has been paid to Mitchell.

SUBSIDIARY FINDINGS OF FACTS AND CONCLUSIONS

Ryken does not dispute that Lammers acquired cattle from Mitchell on August 19 through the use of an insufficient funds check, nor does he dispute that his failure to remit to Lammers the proceeds from the resale of those livestock on August 21 has caused Mitchell to remain unpaid. Rather, Ryken contends he properly used those proceeds to reduce Lammers' pre-existing debt arising out of other transactions. That contention has no merit.

Section 201.39 of the regulations (9 CFR § 201.39) spells out Ryken's duty as a market agency selling consigned livestock regarding the proceeds from the sale of the livestock consigned by Lammers.

No market agency shall . . . [with exceptions not applicable here] pay the net proceeds or any part thereof, arising from the sale of livestock consigned to it for sale, to any person other than the consignor or shipper of such livestock except upon an order from the Secretary or a court of competent jurisdiction, unless (1) such market agency has reason to believe that such person is the owner of the livestock, (2) such person holds a valid unsatisfied mortgage or lien upon the particular livestock, or (3) such person holds a written order authorizing such payment executed by the owner at the time of or immediately following the consignment of such livestock

On or before August 25, 1981, Ryken knew Lammers needed the August 21 sale proceeds to pay Mitchell for the purchase of the livestock, but Ryken testified he received a telephone call during

the week of August 24 from an individual from the Production Credit Association suggesting that the livestock consigned by Lammers on August 21 in fact belonged to Schmidt and that the Production Credit Association had a valid mortgage on the livestock. Although this telephone call appeared to corroborate a claim made earlier by Schmidt that he was the true owner of the livestock, Ryken did not give the proceeds to Schmidt or to the Production Credit Association or to Lammers or to Mitchell. Instead, he used the proceeds on September 1 to reduce the debt he claims Lammers owed him as a result of other livestock transactions. As shown in section 201.39 of the regulations, that is an impermissible use of the sale proceeds from consigned livestock. Moreover, Section 201.42 of the regulations (9 CFR § 201.42) provides that the proceeds generated by the sale of consigned livestock are trust funds which may be withdrawn from a market agency's custodial account for shippers' proceeds only for payment of lawful marketing charges and for "payment of the net proceeds to the consignor or shipper, or such other person or persons who the market agency has knowledge is entitled thereto . . ." Ryken as trustee could not offset against these trust funds a debt owed him individually and not as trustee. Doing so constitutes a well-established unjust practice in violation of section 307 of the Act (7 U.S.C. § 208) and the regulations, for which reparation may be awarded. *Rowse v. Platte Valley Livestock, Inc.*, 43 Agric. Dec. ____ (Feb. 3, 1984), *aff'd*, 604 F. Supp. 1463, 1467 (D. Neb. 1985); *Mid-South Order Buyers, Inc. v. Tige Enterprises*, 34 Agric. Dec. 1691 (1975), and 35 Agric. Dec. 232 (1976), *aff'd*, *Mid South Order Buyers, Inc. v. Platte Valley Livestock, Inc.*, 210 Neb. 382, 394, 315 N.W. 2d 229, 235 (1982); *Rice v. Wilcox*, 34 Agric. Dec. 1651 (1975), 35 Agric. Dec. 212 (1976), *aff'd*, 630 F.2d 586 (8th Cir. 1980); *Minot Livestock Auction v. Wood Bros., et al.*, 24 Agric. Dec. 459, 465 (1965).

When Lammers issued a check to Mitchell for the August 19 purchase, he received title conditioned upon making the payment due. (UCC §§ 2-507(2) and 2-511(3)) Although Lammers could pass that title to a good-faith purchaser (UCC § 2-403(1)), Ryken was not a purchaser, he was Lammers' agent selling the livestock on commission. Ryken's rights to the sale proceeds could rise no higher than the rights of Lammers, his principal. *Rowse v. Platte Valley Livestock*, 604 F. Supp. 1463, 1466 (D. Neb. 1985); *Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc.*, 210 Neb. 382, 395, 315 N.W. 2d 229, 236 (1982). Since Lammers did not in fact pay for the livestock, he did not acquire title to them, and neither he nor Ryken has a right to the proceeds from their resale. Those proceeds belong to Mitchell which was injured by Lammers' fraudulent pur-

chase using an insufficient funds check and by Ryken's misuse of trust funds in violation of the Act and the regulations. Ryken will be ordered to pay reparation to Mitchell for that portion of the August 21 sale proceeds by which Mitchell remains unpaid. (7 U.S.C. §§ 208(a), 209(a))

Ryken argues that the case of *Mid-Columbia Livestock Exchange, Inc. v. Mike Bray, Templeton Sales Yard, Inc., d/b/a Templeton Livestock Market, Richard L. Nock, Duane C. Baxley and Gary A. Davis*, 43 Agric. Dec.____(September 13, 1984) "is on all fours and dispositive of the issues here." That argument is without merit. The *Mid-Columbia* decision dealt only with the issue of whether respondent Templeton Sales Yard, Inc., and its officers were liable for the unpaid purchase price of livestock purchased by respondent Bray from the complainant by virtue of the nature of the business relationship between all of the respondents. Unlike the case at hand, that decision did not address the issue of a market agency's duty regarding the disposition of proceeds from the sale of consigned livestock. Hence *Mid-Columbia* is inapposite to the instant case and is not dispositive of the issues raised here.

Mitchell's cause of action accrued on September 1, 1981, upon receipt of information that Lammers' check was being returned by the bank for insufficient funds. Mitchell's complaint therefore was timely filed on November 24, 1981, within the prescribed 90 day period (9 CFR § 202.103(e)).

Lammers contends Ryken owes him for the following transactions:

DATE	NO.	SPECIES	AMOUNT
7/18/81	16	Hogs	\$1,799.52
7/29/81	42	Cattle	24,432.16
7/29/81	39	Cattle	27,274.78
7/29/81	17	Cattle	8,351.50
7/31/81	2	Cattle	978.19
8/21/81	108	Cattle	52,364.60
8/22/81	68	Hogs	7,381.73
			<hr/> \$122,582.48

Lammers concedes he owes Ryken for the following transactions:

DATE	NO.	SPECIES	AMOUNT
7/31/81	37	Cattle	\$19,397.30
8/4/81	71	Cattle	45,952.85
6/23/81		Hogs	3,620.00 (NSF Check)

DATE	NO.	SPECIES	AMOUNT	
6/23/81	15	Cattle	<u>4,208.20</u>	(NSF Check)
			\$73,178.35	

Subtracting \$73,178.35 from \$122,582.48 leaves \$49,404.13, the amount that Lammers seeks as reparation from Ryken. Of that, Lammers concedes \$45,334.58 belongs to Mitchell, leaving \$4,069.55 as Lammers' independent claim against Ryken. That claim is based in part on allegations that Ryken has retained proceeds of \$7,381.73 from the sale of 63 hogs on August 22, 1981. Ryken denies retaining these proceeds, and there is no evidence in the record to corroborate Lammers' allegations that he has not received the sale proceeds from these 63 hogs. Lammers has therefore failed to sustain his burden to prove his claim by a preponderance of evidence, and his complaint will be dismissed. *See, Lambert v. Moran*, 37 Agric. Dec. 1191 (1978); *Riechers v. Farrar*, 36 Agric. Dec. 356 (1977); *Agri-Link v. J. D. Schultz*, 35 Agric. Dec. 557 (1976).

In his answer to Lammers' complaint in Docket No. 5996 Ryken filed a counterclaim stating:

Daniel Lammers is indebted to Larry Ryken, d/b/a Yankton Livestock Auction Market in the amount of \$3,259.67 arising out of livestock transactions and insufficient fund checks issued by Daniel Lammers which checks are held by Larry Ryken, d/b/a Yankton Livestock Auction Market, as a holder in due course.

This language is identical to Ryken's cross-claim against Lammers in Docket No. 5994.

On brief, Ryken amended his counterclaim as follows:

In sum, Yankton Livestock, pursuant to the transcript to this proceeding, hereby amends its counterclaim against Lammers which counterclaim arises out of the initial transaction brought by Lammers and alleges that Lammers owes Yankton Livestock the amount of \$29,593.78, less credit of \$948.53 plus bad check of \$4,208.20 for a total due and owing of \$32,853.45.

The Rules of Practice governing this proceeding provide that an "amendment cannot state a new and different cause of action if it is filed more than 90 days after accrual of such new and different cause of action . . ." (9 CFR § 202.103f(2)). The Rules provide further: "No counterclaim or cross-claim shall be considered unless it is based on a violation for which the act authorizes reparation to be

ordered to be paid, and filed within 90 days after accrual of the cause of action alleged therein; *Provided*, That a counterclaim not filed within such time limit may be considered if based on a transaction complained of in the complaint." (9 CFR § 202.106(c))

Ryken's original counterclaim does not indicate on what livestock transactions it is based, nor does it indicate whether the alleged insufficient funds checks involved matters over which the Secretary has jurisdiction. It is clear from the amended counterclaim, however, that the original counterclaim was based on Lammers' purchase of 15 cattle from Ryken on June 23, 1981, for which he issued an insufficient funds check in the amount of \$4,208.20. From that, Ryken subtracted a credit of \$948.53, leaving \$3,259.67 as the original counterclaim amount. Ryken's original counterclaim must be dismissed because it was filed in February, 1982, considerably more than 90 days after the cause of action accrued, and it was not based on a transaction complained of in the complaint which did not even mention the June 23, 1981, transaction for \$4,208.20.

The cross-claim must be dismissed because it was not filed within 90 days after the cause of action accrued. As for the amended counterclaim, it seeks \$29,593.78 in addition to the \$3,259.67 request in the original counterclaim. The \$29,593.78 claim arises out of a transaction which occurred on August 26, 1981, involving Lammers, his Uncle Schmidt and IBP. Although that transaction was mentioned in Lammers' complaint, no part of Lammers' claim was based on it. Therefore, since Ryken's amended counterclaim for \$32,853.45 was not filed within 90 days of the accrual of the cause of action and was not based on a transaction complained of in the complaint, it cannot be considered either.

Even if Ryken's amended counterclaim was free from this fatal defect, it would nevertheless fail for want of proof. The \$29,593.78 claim rests entirely on a finding by a referee appointed by the Circuit Court, State of South Dakota, County of Yankton, in the case of *Stanley Schmidt, Plaintiff v. Iowa Beef Processors, Inc., Defendant and Third Party Plaintiff v. Larry Ryken, d/b/a Yankton Livestock Auction Market and Daniel J. Lammers, Third Party Defendants*. Civ. 82-5. The referee stated in a written report submitted to the court:

It is our finding and conclusion that Daniel J. Lammers has not paid a balance of \$29,593.78 for cattle he purchased from Larry Ryken d/b/a Yankton Livestock Auction Market.

The court did not adopt this finding however. Instead, Circuit Judge E.W. Hertz wrote in a June 8, 1984, memorandum opinion:

The Referee's report, which is part of the evidence before the court, reveals that IBP has paid for all of the cattle delivered to it by Lammers, but that Ryken had not received \$29,593.78 due from these August shipments.

Unlike the referee, Judge Hertz did not conclude that Lammers owed Ryken \$29,593.78. In any event, these statements are at best *obiter dicta*, since Ryken did not file a cross-claim against Lammers, his co-defendant. That is, the South Dakota Circuit Court has not adjudicated any factual or legal issues between Lammers and Ryken. Hence the Circuit Court's judgment cannot be deemed *res judicata* in the instant litigation between Lammers and Ryken before the Secretary of Agriculture.

The rule granting conclusiveness to a judgment in regard to issues of fact which could properly have been determined in the action is limited to cases involving the same cause of action. Where a second action is upon a different claim, demand or cause of action, the established rule is that the judgment in the first action operates as an estoppel only as to the issues, points or questions actually litigated and determined and not as to matters not litigated in the former action, even though such matters might properly have been determined therein. Indeed, it has been declared that for an issue to be conclusively determined under the doctrine of *res judicata*, the issue decided in the prior action must have been identical with the issue presented in the later action; and that the plea is not available where the issues in the second action differs in any way from that in the earlier action. Accordingly, before the doctrine of *res judicata* is applied in such cases, it should appear that the precise question involved in the subsequent action was determined in the former action. These rules prevail whether the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*.

46 Am Jur. 2d *Judgments* § 418.

In sum, Ryken's amended counterclaim must be dismissed because it was not timely filed and because it is not based on proof upon which the Secretary may rely.

All contentions of the parties presented for the record have been carefully considered whether or not specifically mentioned herein.

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, 42 F.R. 4395, as authorized by the Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. §§ 450c-450g. It constitutes an "order for the payment of money" within the meaning of section 309(f) of the Act (7 U.S.C. § 210(f)).

Under that section, if Ryken does not comply with this order within the time limit in this order, Mitchell may within one year of the date of this order file in the district court of the United States for the district in which they reside or in which is located the principal place of business of Ryken, or in any state court having general jurisdiction of the parties, a petition setting forth briefly the causes for which damages are claimed and this order in the premises. That section further provides that such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and order herein shall be *prima facie* evidence of the facts herein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon appeal. That section further provides that if the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

It is requested that copies of all pleadings filed by any party in any such suit be filed with the Hearing Clerk, USDA, Washington, D.C. 20250, for inclusion in the file of this reparation proceeding. It is further requested that if the construction of the Act, or the jurisdiction to issue this order, becomes an issue in any such suit, prompt notice be given to the Office of the General Counsel, USDA, Washington, D.C. 20250.

On the Secretary's jurisdiction to issue this order, see discussion in *Neugebauer v. Ryken*, Civ. 74-4018, U.S.D.C., D. So. Dak., So. Div. 1975, 34 Agric. Dec. 1712; *Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc.*, 210 Nebr. 382, 315 N.W.2d 229, 41 Agric. Dec. 48 (1982).

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see rule 17 of the Rules of Practice, 9 CFR § 202.117. On respondent's right to judicial review hereof, see *Maly Livestock Commission v. Hardin, et al.*, 446 F.2d 4, 30 Agric. Dec. 1063 (8th Cir. 1971). On complainant's right to judicial review hereof, see *United States v. I.C.C.*, 337 U.S. 426.

ORDER

Within 30 days of the date hereof, Larry Ryken d/b/a Yankton Livestock Auction Market shall pay to Mitchell Livestock Auction

Co., the sum of \$45,334.58 plus interest thereon at the rate of 13 percent per annum from November 1, 1981, until paid.

The complaint of Daniel Lammers against Larry Ryken d/b/a Yankton Livestock Auction Market is hereby dismissed.

The cross-claim in Docket No. 5994, the counterclaim of the same amount in Docket No. 5996, and the amended counterclaim in Docket No. 5996 of Larry Ryken d/b/a Yankton Livestock Auction Market against Daniel Lammers are hereby dismissed.

Copies hereof shall be served upon the parties.

MIKKELSON BEEF v. LEE BREITSPRECHER. P&S Docket No. 6284. Decided September 30, 1986.

Burden of proof of damages not carried—Dismissal

Complainant sought damages resulting from loss of yield, death loss and labor cost due to fluke infestation in cattle bought from respondent, alleging respondent knew of the fluke infestation, but concealed that knowledge from complainant at time of consignment. Investigations showed that respondent did not reside in the Victoria, Texas, area, where the livestock originated and where fluke infestation is known to be a common problem, and there is no evidence that respondent was advised of the fluke problem. It was thus ruled that complainant had not carried the burden of proving that respondent concealed the fluke problem and accordingly, the complaint was dismissed.

Jory Hochberg, Presiding Officer.

Ben Goff, Oklahoma City, OK, for complainant.

Jock West, Billings, Montana, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*). Complainant filed a formal complaint on July 14, 1983, alleging the purchase on June 16, 1983, of 274 head of cows which had been consigned by the respondent at the Oklahoma City Stockyards. The complainant seeks damages of \$8,796.96, resulting from loss of yield, death loss, and labor costs due to fluke infestation in the cattle. Complainant alleges that respondent had knowledge of the fluke infestation and concealed that knowledge at the time of consignment.

A copy of the investigative report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding pursuant to the rules of practice (9 CFR 202.101 *et seq.*) was served on the complainant. A copy of the complaint and the investigative report was served on respondent, who subsequently

filed an answer and request for oral hearing which was served on the complainant. Thereafter, the complainant filed a reply which was served on the respondent.

An oral hearing was scheduled to take place in Denver, Colorado, on October 3 and 4, 1984. At complainant's request, the hearing was subsequently rescheduled for December 4 and 5, 1984. However, on November 29, 1984, counsel for both parties orally requested and were granted a postponement of the hearing and, in a telephone conference on December 4, 1984, the parties expressed a desire for a written hearing. It was then agreed that ten days after receiving respondent's withdrawal of oral hearing request, complainant's notice of opportunity to file evidence would be filed. However, on June 4, 1985, the oral hearing was rescheduled for August 5 and 6, 1985, as a result of respondent's failure to withdraw its oral hearing request or report the status of the proceeding. Then, on August 2, 1985, respondent filed his withdrawal of oral hearing request and the scheduled oral hearing was postponed. The parties subsequently requested and were granted extensions of time to file written evidence. Neither party filed written evidence or briefs.

FINDINGS OF FACT

1. Mikkelson Beef, Inc., hereinafter referred to as the complainant, is a corporation whose business address is 103 S.E. 8th, Oklahoma City, Oklahoma 73125. Complainant is engaged in the business of buying livestock in commerce for purposes of slaughter as a packer, within the meaning and subject to the provisions of the Act.

2. Lee Breitsprecher, doing business as Two B Cattle Company, hereinafter referred to as the respondent, is an individual whose business address is 2872 Highway 87 East, Billings, Montana 59101. At all times material herein, respondent was engaged in the business of buying and selling livestock in commerce for his own account as a dealer within the meaning and subject to the provisions of the Act.

3. During the first two weeks of June 1983, respondent purchased approximately 1200 head of cows owned by four separate partnerships and located at different locations in the Victoria, Texas, region.

4. About 700 or 800 of these cattle were sold by respondent to packers in the Nebraska and Oklahoma region during the period from approximately June 13, 1983, to June 20, 1983. The remaining 473 head were consigned by respondent for sale at the Oklahoma City Stockyards, hereinafter the stockyards, on June 16, 1983.

5. The 1200 head sold and consigned by respondent all appeared to be healthy at the time of arriving at the various packing plants and at the stockyards.

6. Complainant purchased 274 of the 473 head consigned by respondent at the stockyards on June 16, 1983.

7. Complainant slaughtered the 274 head at its plant during the period June 17, 1983, through June 20, 1983. Upon slaughter, it was first discovered by complainant that these cattle were heavily infested with liver flukes. All, but about a dozen livers were condemned by the U.S.D.A meat inspector at complainant's plant. Other substantial portions of the cows also had to be removed in order for the carcasses to pass inspection.

8. The complaint in this proceeding was filed within 90 days of the accrual of the cause of action.

CONCLUSIONS

Absent fraud, misrepresentation, concealment or an express warranty, the buyer bears the risk of loss after title passes. *Robert Allen v. Clarence Acker*, 34 Agric. Dec. 872 (1975); *Wagner Mills, Inc. v. Paul Spence, et al.*, 34 Agric. Dec. 1339 (1975); *Preston v. Melady Bros.*, 34 Agric. Dec. 1543 (1975). In the present proceeding the salient issue is whether respondent was aware at the time of consignment of the fluke infestation in the cattle complainant purchased on June 16. There is evidence that respondent received a telephone call from the cattle buyer for Northern State Beef Co., Omaha, Nebraska, on June 15. During that conversation, respondent was told that there was excessive liver condemnation for fluke infestation in 189 head which respondent had delivered to that packer on June 13. It is clear that these 189 head were a portion of the 1200 which respondent purchased in Texas. Nevertheless, this is insufficient in itself to place respondent on notice that the cattle consigned to the stockyards were also infested.

First, as found above, the 1,200 head purchased by respondent were owned by four different partnerships and were being shipped from at least two different locations. The trucker who transported the 189 head to Northern State informed the Packers and Stockyards investigator that those particular cattle came from McFaddin, Texas. The health permits for the livestock purchased by complainant, on the other hand, show that the animals purchased by complainant originated at Refugio, Texas, approximately 30 miles from McFaddin. Complainant's prior knowledge of fluke infestation in one of the herds is not sufficient in itself to place him on notice that this problem existed at other locations. It is noteworthy that after Northern's kill on June 14 revealed the fluke infestation, the

Northern buyer agreed to purchase a second lot of cows which respondent stated were owned by the same people, but were kept at a different location. In addition, there is evidence that some of the 1200 head purchased by respondent and sold to Ken Myers Meat Packing Co., Cincinnati, Ohio, did not have a fluke problem.

Nor can complainant rely on the fact that flukes are known as a common problem in the Victoria, Texas, region to carry its burden of proving that the respondent knew of this problem. Respondent does not reside in that region and there is no evidence that he was advised of the fluke problem. It is also clear from the record that respondent informed the commission firm which handled the June 16 sale that the cattle were from Victoria, Texas. This indicates that he was not attempting to conceal the origin of the cattle from others who may have been familiar with this problem.

In concluding that complainant has not carried its burden of proving that respondent concealed the fluke problem, I have taken into account an investigator's summary of a conversation with an employee of Gibbon Packing Co., Gibbon, Nebraska, which is contained in the record. During this conversation, the employee reportedly stated that Gibbon purchased 140 head from respondent and slaughtered these cattle on June 16. The employee further stated that the cattle were infested with flukes and that he subsequently telephoned respondent to tell him that Gibbon would only purchase additional animals if they were significantly discounted. The respondent then reportedly stated he would just sell the rest of them live. The Gibbon employee also stated that at the time of this transaction, the live-cow market was better in Texas than in Nebraska, so he could not understand why respondent had wanted to sell the cattle in Nebraska.

While this statement raises questions concerning respondent's knowledge and intent, it is not a sworn statement of a witness, but a recitation of a telephone conversation with another individual. Moreover, it seemingly contradicts established facts in the record. One must note that at the time of the conversation, respondent had already consigned the cows at the Oklahoma Stockyards, and these were the only cows which he sold "live" (in fact, the record indicates that respondent had probably already sold all of the 1200 cows at the time of this conversation). Consequently, the statement of this packing plant employee, in its present form and without further development, cannot carry complainant's burden of proof.

ORDER

Accordingly, the complaint in this proceeding, is hereby dismissed.

MOLDENHAUER PROPERTIES v. CLAYTON NEUROHR P&S Docket No. 6653. Decided October 6, 1986.

Fraud alleged in livestock sale but no evidence thereof—Dispute held satisfied when payment accepted—Dismissal.

Findings show that respondent Clayton Neurohr bought four semi-truck loads of lambs from complainant Moldenhauer Properties. A dispute then arose regarding payment terms. Complainant, while accepting check, objected to the amount paid for the four loads of lambs. Respondent maintained he did not owe anymore than was paid to complainant by the packers. Satisfaction of the dispute occurred when respondent tendered and complainant accepted the check in payment. Based on these facts, it must be concluded that there was an accord and satisfaction of the dispute. While there was some indication of fraud—understated weights determined after settlement by the Packers and Stockyards Administration—in its execution, present proceeding has neither the evidence nor jurisdiction to determine respondent's liability, if any, regarding such fraud. Accordingly, complaint was dismissed.

Ben Bruner, Presiding Officer.

Pro se, for complainant.

Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 181 *et seq.*). This proceeding arose out of a dispute between the parties over the payment terms of the sale of four loads of lambs purchased on order to two packers by defendant from complainant during the latter part of December, 1984. Complainant filed a formal complaint on September 16, 1985. On January 31, 1985, complainant agreed to a settlement of the dispute based on live weight records provided by one of respondent's principals. These weights were later determined by the Packers and Stockyards Administration to be false and the complainant chose to continue prosecuting his complaint.

A copy of the investigative report prepared by the Packers and Stockyards Administration of the Department of Agriculture and filed in this proceeding pursuant to the rules of practice (9 CFR § 202.101 *et seq.*) was served on the complainant. A copy of the complaint and the investigation report were served on respondent, who subsequently filed an answer and request for oral hearing which

was served on the complainant. Thereafter, the complainant filed a reply which was served on the respondent.

An oral hearing was held on April 29, 1986. Both sides presented themselves *pro se* until the time of the hearing. The morning of April 29, 1986 respondent arrived at the hearing with counsel and has thereafter been represented by Charles T. Edin, Esq. Complainant has continued *pro se* representation. At the conclusion of the hearing, each party was given 45 days to file additional information for consideration by the presiding officer. In addition, complainant was given 30 days after the receipt of additional information from defendant to respond to that additional information. On June 12, 1986, respondent filed a brief and several affidavits with the U.S.D.A. Hearing Clerk. Complainant did not make any response.

FINDINGS OF FACT

1. Moldenhauer Properties, the complainant, is a partnership engaged in the feeding of cattle and sheep. Ed Moldenhauer, his son Clyde Moldenhauer and their respective spouses are the partners constituting Moldenhauer Properties. The business address of complainant is Route 4, Box 148, Minot, North Dakota 58701.

2. Clayton Neurohr, the respondent, is a livestock dealer and order buyer registered with the Secretary of Agriculture as a "Dealer" and a "Market Agency Buying on Commission." The respondent's address is Box 65, Halliday, North Dakota 58636.

3. In late December 1984, complainant and respondent entered into an agreement whereby respondent would purchase four semi-truck loads of lambs from complainant on order. Three loads were purchased on order for Iowa Lamb Corporation of Hawarden, Iowa and one load was purchased for Mid-America Lamb Processing, Inc. of Paulina, Iowa.

4. In January, 1985, a dispute arose between complainant and respondent regarding the payment terms of the agreement. Complainant contended that they were to be paid 63¢/cwt on the live weights of the lambs as determined by the packer at the time of receipt. Respondent contended that he had made clear to complainant that those terms only applied if the lambs yielded 52% after slaughter.

5. On January 31, 1985, respondent agreed to resolve the dispute by paying complainant the difference between what they received from the Iowa Lamb Corporation and 63¢/cwt on the live weights of the animals. With the assistance of Packers and Stockyards Administration officials, using records furnished by Iowa Lamb Corporation, the parties determined \$1,408.05 to be the amount due. Re-

spondent issued a check on February 15, 1985 for that amount. Complainant subsequently deposited the check.

6. After the settlement was executed by the parties, the Packers and Stockyards Administration determined that the weights provided by Iowa Lamb Corporation were false and understated the actual live weights of the lambs.

7. The informal complaint was received on January 14, 1985 within 90 days of the accrual of the cause of action.

CONCLUSIONS

The threshold issue is what, if any, effect does the settlement between the parties of January 31, 1985 have on the disposition of this case. More specifically, it must be determined if the settlement constituted an accord and satisfaction of the dispute such that complainant is estopped from seeking further legal redress. Three elements must be present in order for a defense of accord and satisfaction to prevail. First, there must be a bona fide dispute over a pre-existing contract. Second, there must be a compromise whereby one party agrees to pay the other party a sum in excess of that which he admitted he owed and the receipt by the other party of a sum less than what he claimed was due him, all for the purpose of settling the dispute. Third, the parties must perform (satisfy) the settlement agreement. See, *Delharme Industries, Inc. v. Houston Beechcraft, Inc.*, 669 F.2d 1049 (5th Cir. 1982).

There is no doubt that a bona fide dispute arose regarding the sale by complainant of the four loads of lambs to respondent. Complainant objected to the amount it was paid for the four loads of lambs and respondent maintained throughout that he did not owe any more than what was paid to complainant by the packers.

A more difficult issue is raised regarding whether complainant agreed to discharge its claim in exchange for an amount less than it claimed. Initially, complainant sought approximately \$11,000.00 from respondent. Respondent paid complainant \$1,408.00 for what he believed was a final settlement. This settlement was mediated by a representative of the Packers and Stockyards Administration. The amount \$1,408.00, was arrived at by determining the live weights of the lambs from scale tickets provided to officials of the Packers and Stockyards Administration by Iowa Lamb Corporation and multiplying the total live weight by 63¢ and subtracting the amount paid complainant by Iowa Lamb Corporation. Complainant received a check for \$1,408.00 from the respondent and deposited it immediately.

Testimony from both Mitch Moldenhauer, complainant's clerk and Ed Moldenhauer, a principal of complainant indicated that

they did not consider the \$1,408.00 settlement to be final. The Packers and Stockyards Administration report of investigation into this dispute, however, states that "[o]n January 31, 1985, Neurohr agreed to make settlement to Moldenhauer. . . . "Settlement" in the ordinary sense of the term implies final. It must therefore be concluded that the Packers and Stockyards Administration official who mediated the dispute believed that a final settlement was reached. It must also be assumed that the Packers and Stockyards Administration official indicated to the complainant that the negotiations were for a final settlement. There is no logical purpose in doing anything less. Although testimony from Mitch and Ed Moldenhauer indicated otherwise, on the whole, it is inconceivable that complainant did not consider the payment of \$1408.00 to be a final resolution of the dispute. The second element of an accord and satisfaction is, therefore, satisfied.

Satisfaction of the dispute clearly occurred when respondent tendered and complainant accepted and deposited the check. Based on all of these facts it must be concluded that there was an accord and satisfaction of the dispute of \$1408.00.

As in the case of other contracts, this accord and satisfaction could be set aside if there was evidence of fraud, mistake or accident. *See, Kirkpatrick v. Templeton Sales Yard*, 33 Agric. Dec. 639 (1974). The record is clear that a determination was made by the Packers and Stockyards Administration and is not disputed by respondent that the scale tickets upon which the settlement was based are false. No evidence is contained in the record that would indicate the respondent fraudulently falsified the scale tickets or even knew of their falsification at the time of the settlement. This proceeding is without jurisdiction over meat packers. Iowa Lamb Corporation is a meat packer and the entity from which the allegedly false scale tickets were acquired. There is also no evidence of what relationship existed between the respondent and Iowa Lamb Corporation at the time of the alleged fraud, thereby precluding any determination of an agency relationship between them at that time. Without more facts and the presence of Iowa Lamb Corporation in this proceeding it is impossible to determine what if any fraud occurred and what part if any might be attributable to the respondent.

An accord and satisfaction of the dispute took place on or about January 31, 1985 and while there is some indication of fraud in its execution, this proceeding has neither the evidence nor the jurisdiction to determine the liability of respondent, if any, regarding that fraud. It is therefore not necessary to reach the merits of com-

plainant's allegations as there is nothing in the record that would abrogate the January 31, 1985 settlement.

ORDER

Accordingly, the complaint in this proceeding is hereby dismissed.

DISCIPLINARY DECISIONS

In re: EMERSON ELLIOTT PRODUCE, respondent. PACA Docket No. 2-6970. Decided September 16, 1986.

Decision by Donald Campbell, Judicial Officer.

Edward Silverstein, for complainant

Raymond J. Rotella, for respondent.

ORDER DENYING RECONSIDERATION

COMES NOW EMERSON ELLIOTT, by and through his undersigned Attorneys, and asks this Court to reconsider and rehear the August 22, 1986 ruling denying the Motion to Amend Clerical Errors as untimely, and specifically points out to this administrative officer, in all Rules of Civil Procedure, there is never any time set for correcting clerical mistakes in Judgments. See Federal Rules of Civil Procedure, Rule 60(a).

Since the final decision of this Court contains an improper reference to King's Creek Canning Co., Inc., which creditor proceeding was dismissed, and not a ground which could therefore be utilized for disciplinary action, same should be corrected.

WHEREFORE, Emerson Elliott prays for entry of an Order accordingly.

I HEREBY CERTIFY that a true copy of the foregoing was mailed to Edward M. Silverstein, Esquire, Office of the General Counsel, United States Department of Agriculture, Room 2446, South Building, Washington, D.C. 20250 this 5th day of September, 1986.

MOTION DENIED for reasons previously stated. This is not a "clerical mistake".

In re: FELDMAN BROTHERS PRODUCE, INC. and JOSEPH FELDMAN CORPORATIONS a/t/a THE GREAT AMERICAN PRODUCE COMPANY.
PACA Docket No. 2-7075. Decided September 18, 1986.

William J. Weber, Administrative Law Judge.

Eric Paul, for complainant.

Stephen A. Markus, Cleveland, Ohio, for respondents.

CONSENT DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*;

hereinafter referred to as the "Act"), instituted by a complaint filed on January 28, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges among other things, that during the period September 1984 through February 1985, Respondent failed to make full payment promptly to 85 sellers, of the agreed purchase prices, or balances thereof, in the total amount of \$1,087,262.29 for 324 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate commerce. Such actions were alleged to constitute willful, flagrant and repeated violations of the PACA. A copy of the complaint was served upon Respondents. Respondents filed an Answer admitting their licensing under the PACA and the termination of such licenses upon their failure to pay the required annual license fees. Respondents denied all other material allegations of the complaint and raised a number of affirmative defenses. Respondents and Complainant have now agreed to the entry of the Findings of Fact and a Decision and Order as set forth herein. Therefore, pursuant to Section 1.138 of the Rules of Practice (7 CFR 1.138), the following Decision and Order is issued without further procedure or hearing.

FINDINGS OF FACT

1. Feldman Brothers Produce Company, Inc., and Joseph Feldman, Inc., (hereinafter "Respondents"), are Ohio corporations, whose business address was 1730 Hubbard Road, Youngstown, Ohio 44505 and whose mailing address was P. O. Box 1345, Youngstown, Ohio 44505.

Pursuant to the licensing provisions of the PACA, license number 150372 was issued to Feldman Brothers Produce Company, Inc., on March 25, 1984. This license was renewed annually, but terminated on March 25, 1985, pursuant to Section 4(a) of the PACA (7 U.S.C. 499d(a)), when Respondent failed to pay the required annual license fee. In addition, license number 127106 was issued to Joseph Feldman, Inc., on March 23, 1950. This license was renewed annually, but terminated on March 23, 1985, pursuant to Section 4(a) of the PACA (7 U.S.C. 499d(a)), when Respondent failed to pay the required annual license fee.

3. The Secretary has jurisdiction over Respondents and the subject matter involved herein.

4. Jacob A. Frydman and Ellyse Frydman were responsibly connected with Respondent, Feldman Brothers, Inc., during the period November 16, 1984 through January 25, 1985.

5. During the period September 1984 through February 1985, Respondents failed to make full payment promptly to numerous sellers of the agreed purchase prices, or balances thereof for numerous lots of perishable agricultural commodities, purchased, received, and accepted in interstate commerce.

CONCLUSIONS

Respondents have committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. 499b), by failing to make full payment promptly with respect to the transactions set forth in Findings of Fact No. 5, above, for which the Order below is issued.

ORDER

A finding is made that Respondents have committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. 499b), and the facts and circumstances set forth above shall be published.

Neither Jacob A. Frydman nor Ellyse Frydman, shall be involved in the perishable agricultural commodities industry as a responsibly connected person in perpetuity.

This order shall become effective on service.

Copies hereof shall be served upon the parties.

In re: A. LEVY DISTRIBUTING CO., INC. PACA Docket No. 2-7095. Decided August 13, 1986.

Dorothea A. Baker, Administrative Law Judge.

Edward Silverstein, for complainant.

Richard A. Harris, Fresno, Calif., for respondent.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on February 19, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period November 1983 through March 1985, respondent purchased, received and accepted, in interstate and foreign commerce, from 29 sellers, 59 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the

agreed purchase prices or balances thereof in the total amount of \$132,460.30. Also, it is alleged that, during the period June 1984 through January 1985, respondent, acting as a broker, negotiated transactions on behalf of four principals (two of whom are among the 29 sellers) involving six lots of fruits and vegetables, all being perishable agricultural commodities, in interstate commerce, that it was authorized to collect the proceeds from such transactions on behalf of these principals, that it did make such collections, but that it failed to account truly and correctly to these principals and failed to remit to them a total of \$9,764.14.

A copy of the complaint was served upon respondent, which filed an answer thereto in which it generally denied the material allegations in the complaint, but admitted the allegations in the complaint regarding its bankruptcy filing. Complainant now has filed a motion for a decision generally based on respondent's admissions in its bankruptcy proceeding.¹ Based upon these admissions, the precedent which this forum is bound to follow requires that complainant's motion be granted.² Therefore, upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, A. Levy Distributing Co., Inc., is a corporation, whose address is 1559 West Shaw Avenue, Fresno, California 93711.

2. Pursuant to the licensing provisions of the Act, license number 830669 was issued to respondent on March 11, 1983, was renewed annually, presently is in effect, and was next subject to renewal on or before March 11, 1987.³

3. As more fully set forth in paragraph 5 of the complaint,⁴ during the period June 1984 through January 1985, respondent, acting as a broker, negotiated transactions on behalf of four principals, involving six lots of fruits and vegetables, all being perishable agricultural commodities, in interstate commerce. In accordance with agreements between respondent and its principals, respondent

¹ Official notice is taken of the pleadings filed by respondent in this proceeding which was designated Case No. 185-01307, U.S. Bkrtcy Ct., E.D. CA.

² See *Fava & Company, Inc.*, 43 Agric. Dec. ____ (PACA Docket No. 2-6547, December 4, 1984) (Ruling on Certified Question).

³ The complainant alleged that respondent's license was renewable on March 11, 1986. Official notice is taken of the fact that the Department's records reflect that respondent has renewed its license, and that it is now renewable on March 11, 1987.

⁴ This paragraph was misnumbered as ¶ 6 of the complaint, but was actually the fifth paragraph.

was authorized to negotiate sales or consignment transactions of fruits and vegetables, collect the authorized purchase prices or net proceeds for the fruits and vegetables, and remit the proceeds collected to the sellers, less the reasonable brokerage fee. Respondent invoiced the various receivers for the shipments of fruits and vegetables collected the proceeds for said shipments, but failed to account truly and correctly and to remit to the sellers the monies due them which totalled \$9,764.14.

4. As more fully set forth in paragraph 6 of the complaint, during the period November 1983 through March 1985 respondent purchased, received and accepted in interstate and foreign commerce, from 29 sellers, 59 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$132,460.30.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 65 transactions set forth in Findings of Fact Nos. 3 and 4, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[The Decision and Order became final on September 19, 1986.—Ed.]

*In re: AAA PRODUCE COMPANY. PACA Docket No. 2-7324. Decided
October 28, 1986.*

Dorothea A. Baker, Administrative Law Judge.

Peter Train, for complainant

Leslie A. Davis, St. Louis, Missouri, for respondent

CONSENT DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act, instituted by a complaint filed on September 29, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period October, 1985, through March, 1986, respondent AAA failed to make full payment promptly to 18 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$451,000.31 for purchases of perishable agricultural commodities, which it purchased, received, and accepted in interstate commerce. The complaint further alleges that with respect to certain of these lots of perishable agricultural commodities, purchased in transactions between October, 1985, and February, 1986, 14 of these sellers timely filed written notices preserving statutory trust interests totalling \$305,693.91 and that the respondents failed to maintain and dissipated assets subject to such trust. Such actions were alleged to constitute willful, flagrant and repeated violations of the PACA. A copy of the complaint was served upon the respondent. Respondent and complainant have now agreed to the entry of the Findings of Fact and a Decision and Order as set forth herein. Therefore, pursuant to section 1.138 of the Rules of Practice (7 CFR § 1.138), the following Decision and Order is issued without further procedure or hearing.

FINDINGS OF FACT

1. AAA Produce Company, hereinafter referred to as respondent, is a corporation whose mailing address is 3914 North 25th Street, St. Louis, Missouri 63107.

2. Pursuant to the licensing provisions of the PACA, license number 199643 was issued to the respondent on February 8, 1963. The license is next subject to renewal on or before February 8, 1987.

3. Chad Lombardo, Mike Lombardo, Avis I. Lombardo and Barbara J. Lombardo are individuals whose mailing address is 3914 North 25th Street, St. Louis, Missouri 63107.

4. The owners and officers of respondent AAA are, and at all times material herein were:

(a) Chad Lombardo, President and 10 percent stockholder;

(b) Mike Lombardo, Chairman of the Board and 45 percent stockholder;

(c) Avis I. Lombardo, Vice-President and 45 percent stockholder; and

(d) Barbara J. Lombardo, Secretary.

5. Chad Lombardo, Mike Lombardo, Avis I. Lombardo and Barbara J. Lombardo are responsibly connected with the respondent within the meaning of that term as defined in the PACA (7 U.S.C. § 499a(9)).

6. The Secretary has jurisdiction over respondent and the subject matter involved herein.

7. As set forth more fully in paragraph 6 of the complaint, during the period October, 1985, through March, 1986, respondents failed to make full payment promptly to 18 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$451,000.31 for purchases of perishable agricultural commodities, purchased, received, and accepted in interstate commerce.

8. Respondent admits that it received statutory trust notices from some unpaid sellers in the amount of approximately \$80,000.00 and that it failed to maintain and wilfully dissipated assets subject to such trust interests.

CONCLUSIONS

Respondent has committed willful, flagrant and repeated violations of section 2 of the PACA (7 U.S.C. § 499b), by failing to make full payment promptly with respect to the transactions set forth in Findings of Fact No. 7 above and by failing to maintain the trust interests set forth in Findings of Fact No. 9, above, for which the Order below is issued.

ORDER

Respondent AAA's license is revoked, *Provided, however*, that if AAA makes full payment of the amount due and owing referred to in Finding of Fact No. 7 herein on or before December 15, 1986, the revocation will be remitted to a suspension of the license for 90 days commencing on March 1, 1987.

Chad Lombardo, Mike Lombardo, Avis I. Lombardo and Barbara J. Lombardo, as responsibly connected individuals with AAA,

cannot be employed by any licensee under the Act while AAA's license is suspended.

This order shall become effective on December 15, 1986.

Copies hereof shall be served upon the parties.

In re: HANCOCK NELSON a/t/a CFC WHOLESALE GROCER, CARPENTER COOK, Co., ROBERTS WHOLESALE FOODS. PACA Docket No. 2-7159. Decided September 22, 1986.

Edward H. McGrail, Administrative Law Judge.

Andrew Stanton, for complainant.

Pro se, for respondent

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on April 23, 1986, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period August 1985 through December 1985, respondent purchased, received and accepted, in interstate and foreign commerce, from 39 sellers, 202 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of \$417,822.50.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Hancock Nelson a/t/a CFC Wholesale Grocer, Carpenter Cook Co., and Roberts Wholesale Foods, is a corporation, whose address is 807 Hampden Avenue, St. Paul, Minnesota 55114.

2. Pursuant to the licensing provisions of the Act, license number 851141 was issued to respondent on May 14, 1985, was renewed annually, presently is in effect, and is next subject to renewal on or before May 14, 1987.

3. As more fully set forth in paragraph 5 of the complaint, during the period August 1985 through December 1985 respondent purchased, received and accepted in interstate and foreign commerce, from 39 sellers, 202 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$417,822.40.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 202 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[The Decision and Order became final on October 29, 1986.—Ed.]

REPARATION DECISIONS

MICHAEL S. MCKAY d/b/a OLYMPIC PRODUCE v. RICHARD SHELTON
d/b/a MID-VALLEY BROKERAGE COMPANY. PACA Docket No. 2-
7216. Decided September 4, 1986.

Donald A. Campbell, Judicial Officer

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely formal complaint was filed on February 24, 1986. Complainant seeks to recover \$2,268.75 which amount is alleged to be the total purchase price for a trucklot of onions sold to and accepted by respondent on November 22, 1985. Respondent filed an answer to the formal complaint on June 27, 1986, admitting that \$934.19 of the amount claimed by complainant was due and owing to complainant on account of the transaction involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, \$934.19. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from January 1, 1986, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

It is noted that, in his answer, respondent claims that no interest should be awarded on this amount because he had previously offered it to complainant who refused it. However, respondent's offer was in settlement of the matter and, had it been accepted, would have resulted in an accord and satisfaction. Therefore, complainant could not have accepted the offer. Accordingly, it is proper to award interest on this amount.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

EVERKRISP VEGETABLES, INC., v. ROBERT W. CASTO d/b/a PRIMA
CITRUS & FRUIT EXCHANGE. PACA Docket No. 2-7219. Decided
September 4, 1986.

Donald A. Campbell, Judicial Officer

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely formal complaint was filed on February 6, 1986. Complainant seeks to recover \$9,920.25 which amount is alleged to be the remaining balance for honeydew melons sold to and accepted by respondent on October 21 and October 29, 1985. Respondent filed an answer to the formal complaint on June 3, 1986, admitting that \$622.50 of the amount claimed by complainant was due and owing to complainant on account of the transaction(s) involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, \$622.50. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from December 1, 1985, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

NAT FEINN SALES CORPORATION v. WEINSTEIN PRODUCE SALES, INC.
PACA Docket No. 2-7329. Decided September 4, 1986.

Donald A Campbell, Judicial Officer

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$1,014.35 in connection with a shipment of mixed vegetables in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Nat Feinn Sales Corporation, is a corporation whose address is P. O. Box 848, Fresno, California 93712. Respondent, Weinstein Produce Sales, Inc., is a corporation whose address is P. O. Box 7364, Boise, Idaho. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$1,014.35. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$1,014.35, with interest thereon at the rate of 13 percent per annum from July 1, 1985, until paid.

Copies of this order shall be served upon the parties.

EARL J. ROY d/b/a AVOYELLES SWEET POTATO AUCTION a/t/a EARL J. ROY PRODUCE v. TERRIFIC TOMATO BROKERS, INC., a/t/a TERRIFIC TOMATOES. PACA Docket No. 2-6864. Decided September 5, 1986.

Price dispute—Reparation awarded.

Where complainant alleged parties agreed on firm price and respondent alleged parties agreed on the "market price", and market price was higher than amount complainant alleged as a firm price, reparation was awarded to complainant in the amount of the invoice.

Edward M. Silverstein, Presiding Officer.

Complainant and Respondent, *pro se*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$31,253.00 in connection with two shipments of tomatoes in interstate commerce.

A copy of the report of investigation made by the Department was served upon the parties. Respondent also was served with a copy of the formal complaint, and filed an answer thereto in which it admitted being obligated to complainant in the amount of \$17,326.00, but denied any further liability to complainant. In addition, respondent enclosed its check in the amount of \$17,326.00 made payable to the complainant which it authorized the Department to release to complainant as an undisputed amount. Subsequent thereto, that check was made available to complainant who negotiated it.

Although the amount claimed in the formal complaint exceeded \$15,000.00, the parties waived oral hearing. Therefore, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties is considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. The complainant filed a verified opening statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Earl J. Roy, is an individual doing business as Avoyelles Sweet Potato Auction and also trading as Earl J. Roy Produce, whose mailing address is P.O. Box 134, Hessmer, Louisiana 71341.

2. Respondent, Terrific Tomato Brokers, Inc. a/t/a Terrific Tomato Co., is a corporation whose mailing address is 11459 Little Bear Drive, Boca Raton, Florida 33429. At all material times, respondent was licensed under the Act.

3. On or about January 26, 1985, in the course of interstate commerce, complainant, by oral contract, sold to respondent a truckload of green tomatoes, U.S. Combination Grade, consisting of 588

6×6, 719 6×7, and 293 5×6 lugs, f.o.b. Immokalee, Florida. The tomatoes were the subject of a shipping point inspection on the same date and were graded as U.S. Combination Grade. On or about that same date, the complainant invoiced the respondent for the tomatoes at the following prices: \$11.00 per lug for the 6×6 tomatoes, \$9.00 per lug for the 6×7 tomatoes, and \$13.00 per lug for the 5×6 tomatoes for a total f.o.b. price of \$16,748.00.

4. On or about January 27, 1985, in the course of interstate commerce, by oral contract, complainant sold to respondent a truckload of green tomatoes, U.S. Combination Grade, consisting of 313 lugs 5×6, 766 lugs 6×6, and 521 lugs 6×7 tomatoes. On that same date, the tomatoes were the subject of a federal shipping point inspection and were graded as U.S. Combination Grade. Also, on that same date, the complainant invoiced the respondent for the tomatoes at the following prices: the 6×6 tomatoes at \$9.00 per lug, the 6×7 tomatoes at \$8.00 per lug, and the 5×6 tomatoes at \$11.00 per lug, for a total f.o.b price of \$14,505.00.

5. Each truckload of tomatoes was shipped on the day it was inspected, and was received by the respondent in good order. The respondent also received each of the invoices referenced above. On February 15, 1985, the respondent returned each of the invoices to the complainant, noting on each the following: "The prices on this invoice do not reflect market prices as agreed. Please rebill." Subsequent to receipt thereof, the complainant perfected his right to trust protection pursuant to section 5 of the Act (7 U.S.C. 499e), and resent the invoices to respondent.

6. On or about March 1, 1985, the respondent sent checks to the complainant in the amounts of \$7,584.00 and \$7,148.00 with respect to the shipments. By letter dated April 8, 1985, the complainant returned these checks to respondent.

7. As reported in the Federal-State Market News for Monday, January 28, 1985, the market price for mature green tomatoes in the relevant sizes, in Florida, on that date, were as follows: 5×6—\$20.00, 6×6—\$18.00, and 6×7—\$16.00. Demand was noted as being "moderate," and the market was noted as being "steady." On the following day, demand was noted as being "light," and the market was noted as being "much lower." Also, on January 29, 1985, the prices for the relevant sizes of mature green tomatoes in Florida was noted as being as follows: 5×6—\$15.00, 6×6—\$14.00, and 6×7—\$12.00.

8. The formal complaint was filed on May 22, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The sole issue in dispute between the parties concerns the price agreed upon for the two truckloads of tomatoes which respondent admits purchasing and receiving from complainant. Complainant alleges that the tomatoes were sold at specific agreed prices. The respondent contends, in contradistinction to this, that the prices were not specifically agreed upon, but rather were to be "market prices." The sales of these tomatoes took place on a Saturday and Sunday preceding a week in which the market prices of tomatoes apparently began to drop drastically. However, irrespective of the fact that the tomato prices dropped drastically on the Tuesday following the Saturday and Sunday sale of these two truckloads of tomatoes, the prices at which the complainant invoiced the respondent (\$8.00-\$13.00) were lower than even the market prices on that Tuesday (\$12.00-\$15.00). Therefore, even were we to rule in respondent's favor on the question of whether or not the parties agreed to a specific contract price, and hold that the parties did not so agree, but rather that they agreed the tomatoes were to be billed at the "market price," we would still order it to pay the complainant the prices which the complainant invoiced it. In view of this, we hold that the respondent was obligated to the complainant in the total amount of \$31,253.00. It has paid complainant \$17,326.00, and remains obligated to complainant in the amount of \$13,927.00. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within thirty days from the date of this order, the respondent shall pay the complainant, as reparation, \$13,927.00 plus interest at the rate of 13% per annum from March 1, 1985, until paid.

Copies of this order shall be served upon the parties.

WOODY'S TOMATO CORP., v. D. SCOLARO PRODUCE COMPANY. PACA
Docket No. 2-6870. Decided September 5, 1986.

Acceptance—Reparation.

Where respondent's customer unloaded tomatoes from truck, respondent is deemed to have accepted them and is liable for contract price

Edward M. Silverstein, Presiding Officer.

Pro se, for complainant.

Pro se, for respondent

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$5,801.60 in connection with a shipment of tomatoes in interstate commerce.

A copy of the report of investigation made by the Department was served upon the parties. Respondent also was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00. Therefore, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. The respondent filed a verified answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Woody's Tomato Corp., is a corporation whose mailing address is P.O. Box 962, Palmetto, Florida 33561.

2. Respondent, D. Scolaro Produce Co., is a corporation whose mailing address is Tampa Wholesale Produce Market, P.O. Box 11064, Tampa, Florida 33680. At all material times, respondent was licensed under the Act.

3. On or about May 9, 1984, the respondent placed an order with Mott and Simmons Brokerage and Sales Corp., P.O. Box 1105, La Belle, Florida 33935, for two loads of 6×7 tomatoes. Later that day, the broker confirmed that the order had been placed with Ruskin Vegetable Corp., address unknown. On May 10, respondent was informed by Mott and Simmons that only one of these loads was placed in the gas room, but that the other load would be placed in the gas room later that same day. However, on May 11, Mott and Simmons informed respondent that Ruskin Vegetable Corp. would not be able to fill the order for the second load of 6×7 tomatoes.

Consequently, respondent instructed Mott and Simmons to purchase a second load from someone else. On or about May 15, 1984, Mott and Simmons reported to the respondent that it had placed the order for the second load of 6×7 tomatoes with complainant.

4. On or about May 15, 1984, in the course of interstate commerce, complainant, by oral contract sold to the respondent one truckload of tomatoes consisting of 1,584 cartons, size 6×7, grade Yes Mam, at an agreed price of \$3.00 per carton, plus \$237.60 for palletizing, \$792.00 for gassing, and \$20.00 for a temperature recorder, for a total agreed f.o.b. price of \$5,801.60.

5. At sometime on the day on which the respondent purchased the subject load of tomatoes from complainant, it lost its customer for the load. It then requested that Mott and Simmons place the load elsewhere. Mott and Simmons was able to place the tomatoes with Fred Karem & Sons, Scranton, Pennsylvania.

6. The load of tomatoes was shipped to respondent's customer, Fred Karem & Sons, in Scranton, Pennsylvania, on or about May 16, 1984. The tomatoes were unloaded from the truck by Fred Karem & Sons. Without having them inspected, Fred Karem & Sons notified the respondent through Mott and Simmons that it was rejecting the load of tomatoes. It then had the load of tomatoes placed on board another truck and shipped to the East Tennessee Produce Co., Knoxville, Tennessee. On May 21, 1984, the tomatoes were the subject of a federal lot inspection at the place of business of East Tennessee Produce Company. The inspection certificate (F 048081) indicates that the tomatoes were unloaded from the truck, that the temperature of the tomatoes was 50 to 59°F, and that the condition of the tomatoes was as follows:

Average approximately 5% turning or pink, and 85% light red or red. Decay ranges 2 to 22%, average 12%. Bacterial Soft Rot and Gray Mold Rot each mostly in advanced some in early stages. In most samples from 2 to 10 percent, in some none, average 4% damage by numerous sunken discolored areas occurring over the shoulders.

7. The respondent received \$3,168.00 from East Tennessee Produce which also paid freight of \$700.00.

8. The informal complaint was filed on August 30, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Inasmuch as the respondent's customer in Scranton, Pennsylvania, Fred Karem & Sons, unloaded the tomatoes from the truck, we must conclude that the respondent received and accepted the load

of tomatoes. *Thereon Hooker v. Ben Gatz Co.*, 30 Agric. Dec. 1109 (1971). Having received and accepted the load of tomatoes, it is obligated to the complainant for the contract price, less any damages caused by a breach of contract committed by the complainant. The burden of proving such a breach and such damages is on respondent. *Sunny Ridge Farms v. Edward Dilatush & Co.*, 30 Agric. Dec. 961 (1971). There is no evidence that the complainant committed any breach of contract. Fred Karem & Sons, the respondent's customer in Scranton, Pennsylvania neglected to obtain a federal inspection with regard to the tomatoes. The tomatoes, therefore, were not inspected until May 21 in Knoxville, Tennessee. However, such an inspection, which took place after the tomatoes had been in transport from Florida to Pennsylvania, unloaded in Pennsylvania, reloaded, and then transported from Pennsylvania to Tennessee, over a five day period, cannot be said to reflect the condition of the tomatoes upon arrival in Pennsylvania on May 18, 1984. *Pan-American v. Hazzouri*, 25 Agric. Dec. 681 (1966). In view of this, we must conclude that the respondent has failed to prove any breach of contract on the part of the complainant. It is therefore obligated to the complainant for the full contract price, or \$5,801.60.

In so concluding, we note that respondent may have had a cause of action against Mott and Simmon and/or Fred Karem & Sons under the Act for their actions or failures to act.¹ However, the existence of such a cause of action would not exculpate respondent from its liability to complainant. Respondent's failure to pay the complainant \$5,801.60 is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within thirty days from the date of this order, the respondent shall pay to complainant \$5,801.60, as reparation, plus interest in the amount of 13 percent per annum from June 1, 1984, until paid.

Copies of this order shall be served upon the parties.

¹ Of course, it would have had to have made a timely filing of its complaint against one or both of them. See 7 U.S.C. § 499f.

S&H, INC. d/b/a IDA-PRIDE POTATO CO., v. GARY WATKINS PRODUCE CO., INC. PACA Docket No. 2-6884. Decided Sept. 5, 1986.

Broker—Risk of lack of authority of agents rests on party dealing with agent. Broker's apparent authority not shown. Reparation awarded.

Where buyer did not inquire to determine whether shipper's agent had actual authority to receive payment buyer assumed risk of each of authority and apparent authority cannot be implied on basis of buyer's limited experience with a different broker which in fact, had authority from the shipper to receive payment.

Thomas C Heinz, Presiding Officer.

Fred J Hahn, for complainant, Hazelton, Idaho

William B Schaeffer, Jr., Houston, Texas, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$19,370.00 in connection with the sale and shipment of a carload lot of potatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon respondent, which filed an answer denying liability. Although the amount claimed as damages exceeds \$15,000, because neither party requested an oral hearing, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is being used in this proceeding. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. Both parties used their opportunities to submit additional evidence in the form of verified statements and to file briefs.

FINDINGS OF FACT

1. Complainant S&H, Inc., is a corporation doing business as Ida-Pride Potato Co., (hereinafter "Ida-Pride") with a mailing address at P.O. Box 68, Hazelton, Idaho 83335. At the time of the transaction involved herein, Ida-Pride was licensed under the Act.

2. Respondent Gary Watkins Produce Co. (hereinafter "Watkins") is a corporation with a mailing address at 3160 Produce Row, Houston, Texas 77023. At the time of the transaction involved herein, Watkins was licensed under the Act.

3. On or about May 8, 1984, Ida-Pride sold, by oral contract, to Watkins one carload of potatoes in interstate commerce at an agreed delivered price of \$23,020.00.

4. The transaction involved herein was negotiated by Steve Weidenbaker, d/b/a Steve's Brokerage Co. of Humble, Texas, (hereinafter "Steve's") who acted as agent for Ida-Pride.

5. The potatoes were shipped on May 11, 1984, to Houston, Texas, where they arrived on May 15, 1984.

6. Without the authorization or knowledge of Ida-Pride, Steve's negotiated a reduction in price for the potatoes from \$23,020.00 to \$22,427.57 based upon Watkins' count of the different sizes of potatoes unloaded from the railroad car in Houston.

7. Without the authorization or knowledge of Ida-Pride, Steve's billed and collected \$22,427.57 from Watkins as payment for the potatoes. Steve's has not remitted any portion of that payment to Ida-Pride.

8. In order to retain its credit with the railroad, Watkins has paid the railroad freight bill of \$3,650.00 but has not paid Ida-Pride the remaining \$19,370.00 of the purchase price of the carload of potatoes purchased on May 8, 1984.

9. The informal complaint was filed within nine months after the cause of action herein accrued.

SUBSIDIARY FINDINGS OF FACT AND CONCLUSIONS

Watkins contends it did not receive the original bill Ida-Pride mailed to Watkins in May of 1984, but only a copy which arrived in August of 1984, long after it had paid Steve's on June 13, 1984. Watkins argues that if Ida-Pride had used certified mail to send the May billing or if it had followed up within 30 days of shipment, Watkins would have been prevented from paying Steve's based upon Steve's misrepresentation that it was authorized to receive payment. Watkins further argues that Ida-Pride's past use of brokers to bill and collect cloaked Steve's with apparent authority to do so in the instant case, and that Watkins reasonably relied upon that apparent authority. Ida-Pride, on the other hand, contends it only authorized a few established brokers to bill and collect and would not grant such authority to a newly formed company such as Steve's with no established credit rating. Therefore, Ida-Pride argues, Steve's did not have apparent authority to receive payment.

Since there is no requirement that shippers send bills by certified mail or follow-up unpaid billings within 30 days, Watkins' argument in this regard cannot be credited.

Steve's had no actual authority to receive payment. The question is whether it had apparent authority as a result of Ida-Pride conduct. Although Ida-Pride used brokers for approximately 75% of its business, only three long-established firms had been granted au-

thority to bill and collect: C.H. Robinson Company, Tom Lange Company, and Ruby Robinson Company. Watkins had bought and paid for Ida-Pride potatoes through only one of these, C.H. Robinson Company, on only three occasions in September and October of 1983 before the transaction in dispute occurred in May 1984. This very limited experience with C.H. Robinson Company was not sufficient ground for Watkins reasonably to conclude that Steve's had the same authority to bill and collect for Ida-Pride as did C.H. Robinson, particularly when Steve's was a new company without demonstrated financial reliability. A grant of authority to one broker agent by a shipper does not in itself constitute a grant of the same authority to all broker agents of that shipper.

In *Pasco County Peach Association v. J.F. Smolley & Company*, 164 F. 2d (4th Cir. 1949), 8 Agric. Dec. 327 (1949), the Fourth Circuit Court refused to imply a seller's agent had authority to receive payment in the absence of actual authority and stated: "The rule was long ago established that when one deals with or through an agent he assumes all the risks of lack of authority in the agent . . . The burden of any necessary diligence to ascertain the agent's authority rests on the party dealing with the agent." 146 F. 2d 880, 883. Further, the mere authority to sell does not confer the authority to receive payment. *J. Manning & Co. v. Bass & Swagerty* 34 Agric. Dec. 1036 (1975). *J. Manning & Co. v. Red's Market*, 33 Agric. Dec. 1848, and cases cited at 1851-2 (1974).

When Watkins did not inquire to determine whether Steve's in fact had actual authority to receive payment, it assumed the risk that Steve's did not have such authority, and authority to receive payment cannot be implied under the circumstances of this case. Therefore, payment to Steve's and the later payment of freight to the railroad does not discharge Watkin's liability to Ida-Pride. Failure to pay Ida-Pride the full purchase price of the potatoes minus freight constitutes a violation of section 2 of the Act for which reparation should be awarded.

ORDER

Within 30 days from the date of this order, respondent, Gary Watkins Produce Co., Inc., shall pay to complainant, S&H, Inc., as reparation \$19,370.00, with interest thereon at the rate of 13 per cent per annum from June 1, 1984, until paid.

Copies of this order shall be served upon the parties.

SUNSHINE STATE PRODUCE SALES, INC. *v*. SUMTER VEGETABLE COOP-
ERATIVE. PACA Docket No. 2-6899. Decided September 5, 1986.

Failure to pay total commission—failure to prove—reparation awarded.

From findings it emerges that complainant and respondent entered into contract whereby complainant would act as grower's agent in sales of respondent's produce. On sales effected, complainant was to receive 6% commission, but respondent failed to pay total due. He alleged he was entitled to credit for six transactions handled by complainant, but in this claim respondent was nebulous and submitted insufficient evidence supporting the claim. Respondent was, accordingly, directed to pay reparation to complainant in the amount of the unpaid commission due, plus interest.

George S. Whitten, Presiding Officer.

Pro se, for complainant.

Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$10,332.66 in connection with the shipment in interstate commerce of numerous loads of mixed perishable produce. A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant, and asserting a counterclaim arising out of the same transactions. Complainant filed a reply to the counterclaim.

The amount claimed in neither the formal complaint nor counterclaim exceeds \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Sunshine State Produce Sales, Inc., is a corporation whose address is 1500 West Atlantic Boulevard, Pompano Beach, Florida. At the time of the transactions involved herein complainant was licensed under the Act.

2. Respondent, Sumter Vegetable Cooperative, is a corporation whose address is P.O. Box 648, Webster, Florida. At the time of the transactions involved herein respondent was licensed under the Act.

3. At some time during the latter part of April or the early part of May of 1984, complainant and respondent entered into a contract whereby complainant would act as a grower's agent on behalf of respondent in the sale of respondent's produce. Complainant delivered to respondent a written document setting forth the terms of their agreement, and stating that selling charges would be 6% of gross sales, and further stating in relevant part as follows:

How sales will be made: Naturally we shall do our utmost to sell everything at a firm F.O.B. price. However, authority is granted to us to dispose of your produce according to market, weather and quality conditions as to what we think is to your best advantage. When this becomes necessary, we shall use certain firms with which we have done business for years, also brokers and commission merchants. On such sales, we shall return to you the net proceeds less our customary selling charge. As a normal practice we will not pool or co-mingle various grower's merchandise. However, if it becomes necessary to do so to make a sale, we have the authority to do so.

The Grower's Agent has the authority to make any adjustments or allowances; also the agent will file all claims on behalf of the Growers. In the event of trouble, the Agent shall determine the necessity of inspections or dump certificates.

4. Gross sales amounted to \$1,189,822.40, and the 6% commission on such sales amounted to \$71,389.34. Of this amount respondent has paid to complainant \$58,449.42, leaving a balance of \$12,939.92.

5. The informal complaint was filed on October 9, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Complainant brings this action to recover commissions earned under its grower's agent contract with respondent. Initially complainant alleged that it was aware of receipts totalling \$1,150,731.42, which would warrant commissions in the total amount of \$69,043.89. Complainant stated that it had received \$58,711.23 of this amount from respondent. Complainant also asserted there were other sales after June, 1984, for which complainant had received no commission. During the informal stages of this

proceeding complainant admitted that it owed an outstanding balance of \$4,592.50 to respondent which should be deducted from the total balance due by respondent to complainant.

Respondent, in its answer, agreed with all of the figures submitted by complainant, and referred to above, except that respondent showed that its payment to complainant amounted to \$58,449.42, or \$261.81 less than claimed by complainant. It is interesting that complainant in making the often repeated assertion that respondent had paid \$58,711.23, attached as an exhibit to its complaint a copy of the check issued by respondent to complainant in the amount of \$58,449.42, as well as an accounting from respondent showing the same figure. Neither complainant nor respondent ever explained the discrepancy. We can only surmise that the higher figure used by complainant is to be accounted for by complainant's having credited respondent with the \$261.81 discussed below relative to "exhibit" 1. In view of this probability we have used the lower payment figure claimed by respondent in all our computations herein. Subtracting this payment figure, or \$58,449.42, from the total of the commissions admitted to be due by respondent leaves a balance of \$12,939.92. Respondent does not take issue with this amount. It does assert, however, that it is entitled to credit from complainant in the total amount of \$19,704.54 in connection with six of the transactions handled by complainant for respondent. Respondent using its lesser payment figure referred to above computed a balance due to it from complainant of \$6,764.62. However, respondent completely failed to take into account in its computations the \$4,592.50 which complainant admits it has collected in connection with the sales of respondent's produce, and which it admits is due to respondent.

Basically the only disputed items between respondent and complainant are relative to the six transactions referred to above, in connection with which respondent claims a total of \$19,704.54 as being due from complainant. These constitute an affirmative defense on respondent's part, and respondent has the burden of proving that the amounts alleged due in connection with these transactions are in fact due. See *Newmiller Farms v. Nicolls*, 36 Agric. Dec. 1230 (1977). In its answer respondent set forth each of these six transactions separately, and stated that "there is due complainant \$71,389.34 sales commission less the following items: (Exhibits are enclosed for reasons we do not owe this amount)." Respondent then set forth the six separate amounts which total \$19,704.54, with an exhibit number beside each, numbered from one to six. Respondent then included an explanation as to each "exhibit". However, except as to item number 6, the exhibits attached to respond-

ent's answer have no real relevance to the items set forth in its answer. We will deal with each of these items separately.

As to "exhibit" 1 respondent asserts that commissions in the amount of \$261.81 were taken before adjustments were made to the invoice, and that consequently complainant is not entitled to commissions in such amount. Complainant responded in its reply to the counterclaim that it agreed with this assertion by respondent. Accordingly we conclude that the amount of \$261.81 should be deducted from the commissions which would otherwise be due from respondent to complainant.

As to "exhibit" 2 respondent asserts that complainant's representative, Brad Furguson, erroneously shipped large peppers on an order which called for small peppers. Respondent states that Furguson "claims to have made up for this error by overbilling on subsequent invoices". Respondent further asserts that the mistake was not made up for in this manner, and that comparative returns of other growers who were shipping to other sales agents show that such growers were receiving an average of over \$2.00 per bushel more for their peppers on the same dates. These nebulous assertions, which are totally unsupported by any documentation, constitute all of respondent's evidence on this point, and on this basis respondent claims that \$1,200 is due from complainant to respondent. These claims would be easily dismissed were it not for the fact that complainant in replying to respondent's assertions further muddies the waters by what appears to be an admission. Complainant asserts "as was stated in our letter dated September 7, 1984, there was a \$1,200 loss on TWR invoice 5287. TWR made up \$900.00 of this \$1,200.00 on two other invoices which are noted on the back of invoice 5287. The bookkeeper at Sumter, Mary Ann, is totally aware of this entire situation and has been since the day of occurrence." We are unable to find invoice 5287 anywhere in any of the submissions of the parties in this proceeding. Furthermore, there is no disclosure as to who or what "TWR" is. Complainant has admitted to a \$1,200.00 loss on this invoice, but we have no way of knowing how the loss was incurred, whether such loss was the responsibility of complainant. Furthermore complainant apparently claims that \$900 of the loss was "made up". On the basis of all of the evidence, such as it is, we conclude that respondent has failed to show that it is due \$1,200.00, or any other amount, from complainant as to this transaction.

Respondent asserts that there is due from complainant the sum of \$4,173.16 as to "exhibit" 3. While no invoice was submitted to support respondent's assertions, respondent is making this claim relative to 1470 bushels of peppers which were shipped to "De-

Marco''. Respondent states that the federal inspection made of these peppers following arrival at destination does not "justify cutting the price to 25% of the original sales price". Respondent does not disclose what the original sales price was, but only claims that \$4,173.16 is due from complainant on this transaction. There is no assertion, or evidence, from either party as to when the peppers were shipped, or when they arrived, but there is included as an exhibit to the report of investigation a copy of the federal inspection dated June 18, 1984, covering a portion of the load of peppers which apparently both parties agree was the load in question. The inspection shows that 900 cartons were inspected according to "applicant's count", that temperatures ranged from 47°F. to 49°F., that the inspection was restricted to "product and lading in all layers of eight stacks nearest rear doors", and that the van was loaded to within 15 feet of the rear doors. Respondent asserts that the inspection was too restricted to be representative of the load and consequently the low returns were not justified. If respondent had submitted documentation showing the original invoice price, and had proven the time of shipment and time of arrival of the peppers, there might have been more substance to respondent's claim. However, under the circumstances of this case, and considering the broad discretion granted to complainant to make adjustments on respondent's merchandise, we are unable to find that respondent has proven that any amount is due from complainant to respondent on this load of peppers.

As to "exhibit" 4 respondent states that "much of what was said about item 3 applies to this exhibit", but does not state specifically what part of what was said concerning item 3 it has reference to. Respondent asserts that it is due \$4,959.50 as to item 4. Again, respondent did not submit any invoice, and we have no way of knowing the sale price of this load of produce. A federal inspection covering this load of peppers was also included as an exhibit to the report of investigation. Such inspection covers a load which, according to "applicant's count" consisted of 1444 cartons. The inspection was also made at the place of business of DeMarco Produce in Rosenhayn, New Jersey, and was made on June 21, 1984, at 4:58 p.m. Such inspection shows the temperature of the peppers to have been, at various locations, 48°F. to 49°F. and states that the inspection and certificate are restricted to product and lading in nine stacks nearest rear doors. Respondent again asserts that "this is a very inadequate inspection to justify a reduction in price in 25% of agreed sales price." However, respondent has not shown what the original sales price was and has not shown when the load was shipped, or when it arrived at destination. We conclude that re-

spondent has failed to show that it is due any amount from complainant as to this load.

As to "exhibit" 5 respondent states that it is due the sum of \$2,805.07 from complainant. Respondent's justification for claiming this amount is as follows: "A total of \$46,751.27 was returned below our packing costs, which are \$2.50 per bushel. As per our verbal agreement with Sunshine State Produce Sales, Inc., these items were not to be charged sales fees." Respondent does not show how the claimed \$2,805.07 is related to the justification which it gives claiming such amount. We find that respondent has shown no reason why it should be credited with the claimed \$2,805.07.

As to "exhibit" 6 respondent sets forth four invoice numbers with amounts totalling \$6,305.00 which it states represent amounts paid to complainant, and not remitted to respondent. Complainant's reply is that it has already admitted owing respondent \$4,592.50. However, complainant does not go on to state that it does not owe the balance claimed by respondent on these four invoices. Complainant does state at a later point in its reply to respondent's counterclaim that it feels that "the above statements and facts disprove the counterclaim submitted by Sumter Vegetable Cooperative." However, part of the above statements referred to include complainant's admission as to the first "exhibit." We conclude that complainant has in effect admitted that the balance claimed on the invoices set forth as respondent's "exhibit" 6, or \$6,305.00, is in fact due to respondent. We also conclude that the \$4,592.50 which complainant has admitted owing respondent corresponds to at least some of the invoices referenced in respondent's "exhibit" 6 and that such \$4,592.50 must be viewed as a part of the \$6,305.00 admittedly due to respondent. Apart from this admission by complainant we would be unable to credit respondent with any of the amounts claimed relative to its "exhibit" 6 since respondent submitted insufficient evidence or documentation that such amounts had indeed been paid to complainant, and not remitted to respondent.

Of the \$12,939.92 in commissions which we have found to be due to complainant on the sales of respondent's produce there remains, after offsetting the amounts due from complainant to respondent, a total of \$6,373.11. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest. Since the above computations take into consideration respondent's counterclaim against complainant, such counterclaim should be dismissed.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$6,373.11, with interest thereon at the rate of 13% per annum from August 1, 1984, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

S. STAMOULES, INC., a/t/a STAMOULES PRODUCE CO., v. SID GOODMAN & CO. INC. PACA Docket No. 2-6817. Decided September 8, 1986.

The Statement of a Broker, entitled to great weight—An express warranty may be any promise or guarantee by a seller which entices a buyer or consignor to accept goods—Breach of an express warranty justifies rejection.

The parties agreed to a consignment of 1,764 cartons of cantaloupes by complainant to respondent. Complaint made express warranty that the cantaloupes would be in good condition and "not green". Respondent, through statement of broker, proved a breach of that express warranty.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), hereinafter, "the Act." A timely complaint was filed in which complainant seeks an award of reparation against respondent in the total amount of \$9,287.30, in connection with the consignment of 1,764 cartons of cantaloupes in interstate commerce. A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent and respondent filed a timely answer.

Since the amount claimed as damages does not exceed \$15,000, the shortened method of procedure set forth in the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence herein, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent did not file an answering statement. Complainant also filed a brief, while respondent chose not to do so.

FINDINGS OF FACT

1. S. Stamoules, Inc., a/t/a Stamoules Produce Co. is a corporation whose business mailing address is P.O. Box 56, Mendota, California 93640.

2. Sid Goodman & Co., Inc. is a corporation whose business mailing address is Units 2-12 Building A, Maryland Wholesale Produce Market, Jessup, Maryland 20794. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about August 2, 1984, the parties orally agreed to a consignment of 1,764 cartons of S&S brand cantaloupes 12's by complainant to respondent.

4. The contract for this consignment was negotiated by Sunburst Produce, Co., Inc., a licensed broker located in Bonita, California. As a condition of this contract, complainant guaranteed that the cantaloupes would arrive in good color and condition.

5. Upon arrival on or about August 14, 1984, respondent's agents determined that the color and condition of the cantaloupes were not as guaranteed, and communicated a rejection to complainant.

6. Complainant initially sought to find another consignee or a buyer for the melons with the assistance of Sunburst Produce Co., Inc. Subsequently, complainant attempted to refuse the rejection tendered by respondent.

7. An inspection conducted approximately three days after arrival showed that the color and condition of the cantaloupes were not as guaranteed.

8. The formal complaint in this proceeding was filed on March 7, 1985, which was within nine months after the cause of action accrued.

CONCLUSIONS

The record supports the conclusion that the complainant expressly warranted the color and condition of the consignment of cantaloupes and that they were not delivered in conformity with that warranty. The record further supports the conclusion that the complainant accepted respondent's rejection of the cantaloupes. Either one of these conclusions is sufficient to warrant a dismissal of the complaint.

The record supports respondent's contention that at the time of negotiating this contract, respondent specifically informed complainant that it would not accept or handle the melons unless they were not green and were of good quality. The broker who negotiated this contract confirms that this was a requirement of the respondent and that these terms were stated to the complainant, which then guaranteed the shipment in accordance with the re-

quirements of the respondent. The statement of the broker, an impartial third party is entitled to great weight. *Homestead Tomato Packing Co. v. Mims Produce* 43 Agric. Dec. ____ 2984; *Kern Ridge Growers v. T.J. Power & Co.* 40 Agric. Dec. 425 (1981). In the present proceeding, it is sufficient to carry respondent's burden of proving the existence of an express warranty. *Spada Distributing Co. Inc. v. Michael Swanson Brady Produce Co.* 19 Agric. Dec. 88 (1980). An express warranty may be any guarantee or promise by a seller which induces a buyer to purchase goods, or a consignee to accept the goods. *Wine Produce Co. v. Arrowhead Growers Sales*, 17 Agric. Dec. 1243 (1958).

The inspection which was performed at respondent's request clearly shows that the cantaloupes were "mostly green" at the time of arrival. This establishes the breach of contract by the complainant. Where the goods delivered are not of the kind or quality contracted for, the buyer or consignee may refuse to accept them. *Franklin Produce Exchange v. Kelly*, 17 Agric. Dec. 756 (1958). In this case, respondent's rejection was in clear and unmistakable terms, as it must to be. *Davison Grape Co. v. Mercurio* 18 Agric. Dec. 1484 (1959).

Furthermore, the record supports a finding that complainant accepted respondent's rejection of the cantaloupes. The statement of the broker establishes that after the rejection was communicated to complainant, the complainant requested, and the broker provided assistance in attempting to locate another consignee or a buyer. It was only after these attempts were unsuccessful that the complainant decided respondent must pay for the shipment. Complainant's telegrams communicating a refusal to accept the rejection do not change this result since complainant's statements to the broker could be properly interpreted as reversing that refusal. In any event, as concluded above, the rejection was made in clear and unmistakable terms and the respondent was entitled to reject the cantaloupes as a result of complainant's breach of its express warranty.

ORDER

The complaint in this proceeding is hereby dismissed.
Copies of this order shall be served upon the parties.

JOHN K. HARMON d/b/a HARMON COMPANY PRODUCE v. PACIFIC GAMBLE ROBINSON COMPANY a/t/a PACIFIC FRUIT AND PRODUCE COMPANY. PACA Docket No. 2-6939. Decided September 8, 1986.

Unloading constitutes acceptance—Proof that commodity is commercially worthless in absence of dump certificate—Use of Market News quotations to establish market price.

Inspection report showing 44% condition damages and receiver's daily shrink report showed some 38% of shipment dumped is sufficient evidence to show 38% commercially worthless so as to justify dumping. Respondent entitled to claim these damages for receiving non-conforming goods

In dispute over whether there was an agreement to return bins in shipping watermelons, Market News Reports were used to establish complainant charged only market price for watermelons and therefore established that bins were to be returned.

Peter V. Train, Presiding Officer.

Complainant and Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$4,047.10 in connection with the sale of watermelons in interstate commerce.

A copy of the formal complaint and a copy of the Department's report of investigation were served upon respondent. A copy of the report of investigation was served upon complainant.

Respondent filed an answer alleging that it was not liable for the entire amount claimed because some of the watermelons were damaged and had to be dumped. Respondent asserted that it owed complainant only \$1,524.35 after appropriate deductions were taken. An order requiring payment of the undisputed amount was entered on October 7, 1985 and such payment has been made.

Since the amount claimed in damages does not exceed \$15,000.00, the shortened procedure provided for in section 47.20 of the Rules of Practice (7 CFR § 47.20) applies. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements. Both parties filed opening statements. Respondent filed an answering statement and complainant filed a statement in reply. Respondent also filed a brief in the form

of a closing statement. Complainant declined the opportunity to file a brief.

FINDINGS OF FACT

1. Complainant John K. Harmon, hereinafter referred to as the complainant, is an individual doing business as Harmon Company Produce whose address is 3821 E. Bronco Trail, Phoenix, Arizona 85044.

2. Respondent, Pacific Gamble Robinson Company, hereinafter referred to as the respondent, is a corporation which also trades as Pacific Fruit and Produce Company, whose address is 3140 North Webster, Portland, Oregon 97217.

3. Both parties are, and at all times herein were, licensed with the Secretary of Agriculture to do business under the Act.

4. On June 22, 1984, complainant sold to respondent one truckload of striped, number one quality watermelons in interstate commerce at an agreed price of 7¢ a pound. The total invoice price was \$3,417.10 which included a charge for additional pallets required in shipping the watermelons in an open bed truck, f.o.b. The invoice price did not include a charge for the 42 bins in which the watermelons were shipped.

5. The truck arrived at respondent's place of business on June 25, 1984, where they were received and accepted. A federal inspection was made of the watermelons on June 25, 1984. The report shows that 40 bins of watermelons were inspected in respondent's warehouse. The relevant results were as follows:

Condition: Generally firm. Average 4% damage by transit rubs. From 1 to 3 melons per sample (20 to 60%), average 35% damage including 10% serious damage by internal rind spot. Decay in most samples 1 to 2 melons per sample (5 to 10%), many none, average 5%. Decay is brown, moist, firm and has a sour odor.

6. Watermelons weighting 18,100 pounds were dumped by respondent. Respondent did not obtain an official dump certificate.

7. The formal complaint was filed on March 12, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

This case involves the questions of whether the watermelon shipped met the specifications of the contract and if not, whether the receiver-respondent has proved that they were commercially worthless so as to justify being dumped. Another issue to be resolved is whether the respondent agreed to return the bins and pal

lets used to transport the watermelons as complainant alleged. Respondent asserts that it had to dump 18,100 pounds of watermelons which were damaged. It is well established, however, that by unloading the watermelons respondent accepted the entire load. See, e.g., *Crown Orchard Company v. Mid-Valley Products Corp.*, 34 Agric. Dec. 1381 (1975); *Mario Saikhon v. Russell-Ward Company, Inc.*, 34 Agric. Dec. 1940 (1975). By accepting the watermelons, respondent became liable to complainant for the contract price less any damages resulting from a breach of the contract by complainant. See *Theron Hooker Company v. Ben Gatz Co.*, 30 Agric. Dec. 1109, 112 (1971); *Rydell California Potato Co. v. The Kaufman-Brown Potato Company*, 16 Agric. Dec. 1055 (1957). The question to be resolved, therefore, is whether respondent has met its burden to show a breach by complainant and, if so, how it was damaged by this breach.

Complainant correctly points out that once the watermelons were taken off the truck and placed in respondent's warehouse, there is no absolute assurance that the watermelons inspected on June 25, 1984, were the watermelons he shipped. Respondent, however, has presented a sworn statement that the watermelons inspected were complainant's, and supported that statement with its inventory report showing that there was only one other small load of watermelons in its possession on the date. Additionally it is noted that the inspection report itself indicates that it inspected 40 bins weighing 45,250 pounds. While, in fact, 42 bins were shipped the figures given are sufficiently close to warrant a finding that the watermelons inspected were those shipped by complainant.

An examination of the inspection report clearly establishes that complainant breached the contract by failing to ship watermelons in conformity with the contract. The inspection report indicates that there was an average of 35% damage including 10% serious damage by internal rind spot. Additionally there was an average 5% decay and 4% damage by transit rub. This is well in excess of the tolerances allowed. See 7 CFR §§ 51.1970-1987.

Respondent asserts that it had to dump 18,100 pounds of watermelons. This is in excess of 38 percent of the load. Under section 46.22 of the regulations (7 CFR § 46.22), respondent has to provide an official dump certificate or other adequate evidence that the produce was commercially worthless if 5 percent or more of a shipment is dumped. No dump certificate was provided. Rather, respondent provided a copy of the federal inspection report for lot 357, and what it calls a Daily Shrinkage Report showing that it dumped 18,100 pounds of watermelons from lot 357 on June 26, 1984. Neither an inspection report showing condition defects or re-

spondent's self generated Daily Shrinkage Report alone are sufficient to show that the produce was commercially worthless. However, where the inspection report shows damage of 44 percent from various factors, we find that the report together with the respondent's shrinkage report constitutes sufficiently adequate evidence that some 38 percent of the load was commercially worthless. *Homestead Pole Bean Co-op, Inc. v. Wayne F. Jones*, PACA 2-6345, 43 Agric. Dec. —, (1984); *Eggren & Sons, Inc. v. Wood Co.*, 11 Agric. Dec. 1032 (1952). The inspection report together with the Daily Shrinkage Report constitutes sufficient evidence that respondent properly dumped the watermelons.

Respondent claims damages of \$2,127.40 calculated as follows:

\$234.65 for an erroneous overcharge of \$.005 per pound
\$1,267.00 for the cost of the dumped watermelons
\$47.70 for 3 hours labor in repacking the load
\$543.00 for the freight paid on the dumped watermelons
\$35.05 for the USDA inspection fee

The overcharge was corrected in the complaint herein and thus is no longer an issue. Complainant has not asserted that these calculations are unreasonable. The other deductions do seem reasonable and justified under the circumstances and will be allowed with the exception of the inspection fees which have been consistently disallowed since they are considered an expense for obtaining evidence. *See, e.g., Ritepak Produce v. Green Grove Markets* 29 Agric. Dec. 165, 170 (1970). Total damages are therefore \$1,857.70.

The final issue to be resolved in this case is whether the parties agreed that the respondent would return the bins and pallets issued in transporting the watermelons. There is no explicit agreement, but complainant asserts that it is common industry practice for receivers to return the bins. Additionally, complainant argues that had there not been an agreement for the return of the bins, he would have charged for the bins. Instead he alleges he only charged the market price (7¢ per pound). Respondent offers the sworn statement of its Nogales, Arizona manager who denies there was an agreement to return the bins, and denies that it is common industry practice to return bins.

Complainant offers no evidence that the market price of the watermelons alone was 7¢ per pound, but official notice may be taken of relevant market price quotations from applicable Federal Market News Service reports. *Artco Distributors, Inc. v. Mandell, Spector, Rudolph Co.*, 24 Agric. Dec. 1155 (1965). A review of the Market News Service report for the Phoenix, Arizona area for watermelons on June 22, 1984 substantiates complainant's claim that

the 7¢ per-pound charged was the market price. See Volume LVIX, Vegetable and Fruit Report No. 182, June 22, 1984. Therefore, we believe complainant has met its burden to show by a preponderance of the evidence that the invoice price was only for the watermelons, with the bins to be returned to complainant. Complainant has valued the unreturned bins and pallets at \$630.00 which was unchallenged by respondent.

In summary, because respondent accepted the watermelons it is liable for the invoice price including the value of the bins less any damages sustained by complainant's failure to ship watermelons conforming to the terms of the contract. Respondent's damages are \$1,857.70. This leaves \$2,189.40 owing on the contract. Respondent has already paid \$1,524.35 which was not in dispute. The amount still unpaid is thus 665.05. The failure of respondent to pay this amount to complainant is a violation of section 2 of the Act. Reparation should be awarded to complainant in the amount of \$665.05, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$665.05, with interest thereon at the rate of 13 percent per annum from August 1, 1984, until paid.

Copies hereof shall be served upon the parties.

GAC PRODUCE CO., INC., v. G & J PRODUCE, INC. PACA Docket No. 2-6942. Decided September 8, 1986.

Disputed price—Liable less sum already paid.

Complainant sold various consignments of tomatoes to respondent, who paid complainant only part of the total amount due. The broker who negotiated the contracts between the parties affirmed to the Department that an adjustment was made in regard to a third load of tomatoes, but he failed to state the amount of the adjustment. Thus, his assertion that an adjustment was made is of no value in that it failed to specify the adjustment amount. The same broker affirmed there were two price reductions agreed to by complainant who, however, disputed the amounts involved. Total balance found due from respondent to complainant was \$8,400.80. Accordingly, respondent was directed to pay that amount to complainant with 13% interest yearly until paid.

George S. Whitten, Presiding Officer.
Pro se, for complainant.
Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$16,723.40 in connection with the shipment in interstate commerce of three truckloads of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

Although the amount claimed in the formal complaint exceeds \$15,000.00, neither party requested an oral hearing, and accordingly the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified complaint is considered a part of the evidence in this proceeding as is the Department's report of investigation. The answer, since it was not verified, is not in evidence. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, GAC Produce Co., Inc., is a corporation whose address is P.O. Box 1281, Nogales, Arizona.

2. Respondent, G & J Produce Inc., is a corporation whose address is 2526 Airline Drive, Suite 106, Houston, Texas. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about August 11, 1984, complainant sold to respondent, and shipped from loading point in California to respondent in Houston, Texas, one truckload containing 726 flats of 4×4 pink tomatoes at \$10.05 per flat, and 990 flats of 5×5 pink tomatoes at \$10.05 per flat, plus 65 cents per flat for palletizing and precooling, or a total of \$18,361.20. Respondent accepted the tomatoes on arrival, and has paid complainant \$14,928.20 leaving a balance still due of \$3,433.00

4. On or about August 13, 1984, complainant sold to respondent, and shipped from loading point in California to respondent in Houston, Texas, one truckload containing 858 flats of 4×4 pink tomatoes at \$10.05 per flat, and 858 flats of 4×5 pink tomatoes at \$10.05 per flat, plus 65 cents per flat for palletizing and precooling, or a total price of \$18,361.20. Following arrival of these tomatoes complainant granted respondent an allowance of \$8,322.60 which left a balance of \$10,038.60.

5. On or about August 15, 1984, complainant sold to respondent, and shipped from loading point in California to respondent in Houston, Texas, one truckload containing 528 flats of 4×4 pink tomatoes at \$8.05, 660 flats of 4×5 pink tomatoes at \$8.05, and 528 flats of 5×5 pink tomatoes at \$8.05, plus 65 cents per flat for palletizing and precooling, or a total price of \$14,929.20.

6. The contracts were negotiated through Go For It Brokerage and Procurement, a broker located in Nogales, Arizona.

7. Respondent made payment to complainant in two installments of \$10,000.00 each, or a total of \$20,000.00 on the last two shipments of tomatoes.

8. An informal complaint was filed on November 8, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

The brokerage firm that negotiated the contracts between complainant and respondent affirmed in a letter to the Department, which is included as an exhibit to the Department's report of investigation, that there was no adjustment made as to the purchase price on the first load of tomatoes. Respondent apparently is in agreement with this position, and we conclude that there is due a balance of \$3,433.00 to complainant as to this load of tomatoes.

The same broker affirmed that there were two reductions in price agreed to by complainant as to the second load of tomatoes shipped on August 13, 1984. The broker asserted that these two adjustments totalled \$4.00 per carton, or a total for the load of \$6,864, which would leave a balance still due from respondent to complainant of \$11,497.20. However, complainant stated in its informal complaint that the allowance granted on this load was \$8,322.60, and that the remaining balance due was \$10,038.60. When complainant filed the formal complaint it credited respondent with the \$10,000.00 payment made on this load, but claimed as a balance still due \$8,361.21. Complainant could only claim such figure by virtue of a failure to give respondent credit for the allowance which complainant had previously admitted. On the basis of com-

plainant's admission we find that there remains due as to the August 13, 1984, load of tomatoes only \$38.60.

The broker affirmed in its letter to the Department that an adjustment was made in regard to the third load of tomatoes. However, the broker nowhere states the amount of this adjustment. Respondent states in its unverified answer that the adjusted price on the third load was \$6.05 per carton. Unfortunately, this assertion by respondent has no evidentiary standing in this proceeding. While an unverified pleading serves to frame the issues between the parties, it is not a part of the evidentiary record. See *Chapman Fruit Co., Inc. v. Tri-State Sales Agency*, 44 Agric. Dec. —, (PACA Docket No. 2-6641), (1985). The broker's assertion that an adjustment was made is of no value since it fails to specify the amount of the adjustment. We conclude that a balance of \$4,929.20 remains due on the third load of tomatoes, after deduction of the \$10,000.00 paid by respondent. The total amount which we have found to be remaining due from respondent to complainant in this proceeding is \$8,400.80. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$8,400.80, with interest thereon at the rate of 13% per annum from September 1, 1984, until paid.

Copies of this order shall be served upon the parties.

JOHN W. HEAD PRODUCE CO. v. GREENBELT FARMS, INC. PACA
Docket No. 2-6968. Decided September 8, 1986.

Complainant's burden to prove contract terms—Breach of contract by failing to ship—Damages from failure to ship—Cover purchase made in good faith and without unreasonable delay.

Complainant failed to sustain its burden of proving that its contracts for the shipment of three loads of watermelons were subject to availability. Respondent entitled to damages due to complainant's breach of contract by failing to ship two of the loads. Respondent's damages are the difference between the contract prices and the prices paid for cover purchases made in good faith and without unreasonable delay. The cover purchases met these standards. Respondent already paid complainant the difference between the contract price for the one accepted load and respondent's damages, and is without further liability.

Andrew Stanton, Presiding Officer.
Complainant and Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$2,093.90 in connection with the shipment of a truckload of watermelons in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but declined to do so.

FINDINGS OF FACT

1. Complainant, John W. Head Produce Co., is an individual, John Head, whose address is P.O. Box 1532, Arcadia, Florida.

2. Respondent, Greenbelt Farms, Inc., is a corporation whose address is P.O. Box 433, Crystal Springs, Mississippi. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately May 8, 1985, complainant sold to respondent, by oral contract, three truckloads of medium U.S. number one watermelons at \$.07 per pound, f.o.b., for shipment to be made on May 10, 11, and 12, 1985. The contract did not provide that shipment was to be subject to availability. The contract was entered into between complainant's owner, John Head, and respondent's employee, J. N. Barron.

4. On May 10, 1985, complainant shipped in interstate commerce to respondent one truckload of watermelons complying with the contract terms, consisting of 46,330 pounds, for a price of \$3,243.10. The watermelons were accepted by respondent. Complainant did not ship any additional loads to respondent.

5. On May 15, 1985, respondent sent a telegram to complainant stating as follows: "Refon [sic?] after a week delay and promise of shipment of three trailer loads of good cutters and quality medium gray watermelons at 7 cents pound f.o.b. expect to buy two loads not yet furnished for your account unless you can load one today and one tomorrow advise."

6. After receiving respondent's telegram, complainant replied on May 16, 1985, as follows:

In reference to your wire dated May 15, 1985 our terms were subject to availability. Thus without availability our agreement is rescinded. If loads become available you'll be advised with new terms. Buying on my account will not be tolerated. As of May 16, 1985 your account with us has an outstanding balance of \$3,243.10. Any misuse or mishandling of this account will be pursued with legal action.

7. In a September 17, 1985, affidavit, James B. Baldwin, Secretary-Treasurer of respondent's customer, Ginsburg-Lansburg, Inc., Sioux City, Iowa, stated that on May 15, 1985, he called complainant's John Head to find out why the watermelons his firm had purchased from respondent, one of the two loads complainant failed to ship, had not been loaded onto the truck. Mr. Baldwin stated as follows, in relevant part:

During the course of the conversation on May 15th with Mr. Head, in which George Albritton (President of Greenbelt Farms, Inc.) was privy via conference call, Mr. Head admitted that he had no intention of filling the order at that time because the market had become stronger and he was loading multiple loads for other people at a higher price. He indicated that Greenbelt Farms, Inc. could not force delivery and that they had no remedy because they failed to issue a written confirmation and did not furnish any purchase order number. Mr. Head did not indicate that supply was any factor in his refusing to deliver.

In a September 24, 1985, affidavit, respondent's president, George Albritton, asserted the same version of events as Mr. Baldwin regarding the May 15, 1985, telephone conversation with Mr. Head.

8. On approximately May 16, 1985, respondent purchased from Pacific Landco, Immokalee, Florida, a truckload of watermelons consisting of 44,920 pounds at \$.09 per pound, for a total of \$4,042.80. On approximately May 17, 1985, respondent purchased from Charlie Adcock, Jackson, Mississippi, a truckload of water-

melons consisting of 39,850 pounds at \$.105 per pound for a total of \$4,184.25.

9. On May 24, 1985, respondent sent complainant a check for \$1,149.20. Accompanying this was a letter from respondent's Mr. Barron, who said that he had deducted from the \$3,242.10 purchase price of the May 10, 1985, load the amount respondent paid in excess of the original contract price for the purchase of two loads of replacement watermelons. Mr. Barron stated that he charged \$.02 per pound for 44,920 pounds or \$898.40, and \$.03 per pound for 39,850 pounds or \$1,195.50, for a total price of \$2,093.90. Deducting this from the \$3,243.10 purchase price of the May 10, 1985, shipment results in \$1,149.20, which Mr. Barron claimed to be the balance owed. Complainant accepted the \$1,149.20 check as partial payment for the May 10, 1985, load.

10. A formal complaint was filed on July 10, 1985, which was within nine months from when the alleged cause of action herein accrued.

CONCLUSIONS

Complainant alleges that respondent wrongfully deducted \$2,093.90 from the \$3,243.10 contract price of a load of watermelons shipped on May 10, 1985, and accepted by respondent. Respondent claims that its deductions reflected damages incurred when complainant failed to ship two watermelon loads, in breach of contract, and respondent was therefore forced to pay a higher price in making its replacement purchases.

The parties agree that their contract was for the sale of three loads of watermelons, for shipment on May 10, May 11, and May 12, 1985. Complainant insists that the contract terms provided that shipment would be contingent on availability of the watermelons. Respondent denies the existence of such a contingency and claims that complainant's failure to ship two of the three loads constituted a breach of contract. As the moving party herein, it is complainant's burden to prove by a preponderance of the evidence the contract terms, respondent's breach of contract, and complainant's resulting damages. *Pablo Hernandez d/b/a Pablo Distributors v. Paragon Distributing, Inc.*, 42 Agric. Dec. 438 (1983). It is our conclusion that complainant has failed to sustain its burden of proving that the contract provided for shipment to be contingent on the availability of watermelons. Complainant's owner, John Head, has submitted a sworn statement in which he claims that such a provision was part of the contract, but his statement is flatly contradicted by the sworn statement of respondent's employee, J.N. Barron, who negotiated the contract with Mr. Head. In a May 15, 1985,

telegram to respondent, in response to respondent's May 15, 1985, telegram demanding that complainant ship the two loads, Mr. Head asserted that subject to availability terms were part of the contract. However, respondent has submitted affidavits by James B. Baldwin, secretary-treasurer of its customer, Ginsburg-Lansburg, Inc., Sioux City, Iowa, who was supposed to receive one of the loads, and respondent's president, George Albritton. According to Mr. Baldwin and Mr. Albritton, they spoke by telephone on May 15, 1985, with Mr. Head, who stated that he did not intend to fill respondent's order because the market had risen, and he was handling many loads for others at a higher price (Finding of Fact 7). Complainant has never denied that this telephone conversation occurred. This evidence casts grave doubt on complainant's claim that shipment was supposed to be subject to availability, and we find that such a term was not part of the contract. Therefore, by failing to ship two of the three loads of watermelons, complainant breached its contract with respondent.

As damages resulting from complainant's failure to ship, respondent was entitled to make a cover purchase, with complainant liable for the difference between the cost of the cover purchase and the contract price, provided the cover purchase was made in good faith and without unreasonable delay. *Feldman Brothers Produce Co., Inc. v. A. Pellegrino & Sons*, 32 Agric. Dec. 1845 (1973); Uniform Commercial Code, Section 2-712. We are satisfied from the evidence that respondent's cover purchases from Pacific Landco., Immokalee, Florida, of 44,920 pounds at \$.09 per pound, and Charlie Adcock, Jackson, Mississippi of 39,850 pounds at \$.105 per pound, were made in good faith and without unreasonable delay. Therefore, respondent's damages constitute \$.02 per pound for 44,920 pounds, or \$898.40, and \$.035 per pound for 39,850 pounds, or \$1,394.75, for a total of \$2,293.15. Respondent has claimed \$2,093.90 as its damages, and we shall use this lesser figure. Respondent's liability to complainant is thus \$3,243.10 less \$2,093.90, or \$1,149.20. Having already paid this sum, respondent is without any additional liability, and the complaint therefore should be dismissed.

ORDER

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

NSG INTERNATIONAL MARKETING INC. v. UNION PRODUCE DISTRIBUTORS INC. PACA Docket No. 2-6832. Decided September 9, 1986.

Mistake as to contract terms—Proof of reasonable value of goods by reference to Market News.

Where parties did not agree as to whether agreement was for consignment sale or a guaranteed minimum price, no contract is established. In the absence of prompt and proper resale, the only manner to establish reasonable value of goods accepted was by reference to applicable Market News Reports. A value of \$3.50 per box was imputed to the mangos in question and awarded to complainant after deduction of respondent's 18% commission.

Peter V. Train, Presiding Officer

Complainant, *pro se*.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$55,476.00 in connection with the sale of four loads of mangos in interstate commerce. At oral hearing, complainant amended its complaint to reduce the amount sought to \$40,428.00.

A copy of the formal complaint and a copy of the Department's report of investigation were served upon respondent. A copy of the report of investigation was served upon complainant.

Respondent filed an answer in which it denied liability for the amount claimed. It asserted that it had agreed to sell the mangos on a consignment basis with a commission charge of 18 percent. It denied complainant's claim that the agreement called for complainant to receive a minimum of \$4.50 per box.

An oral hearing was held in Los Angeles, California on January 27, 1986, and June 12, 1986.

Neither party filed proposed findings of fact or briefs after the hearing.

FINDINGS OF FACT

1. Complainant NSG International Marketing, Inc., hereinafter referred to as complainant, is a corporation whose mailing address is 437 Mission Drive, Camarillo, California 93010. At the time of the transactions in question, complainant was a partnership which subsequently transferred all its assets to the corporation.

2. Respondent Union Produce Distributors, Inc., is, and at all times material herein was, a corporation whose mailing address is 1901 Violet Street, Los Angeles, California 90021.

3. Both parties are, and at the time of the transactions involved herein were, licensed to do business under the Act.

4. The parties had an agreement that complainant would ship mangos to respondent who would market them. Respondent would receive an 18 percent commission for its efforts. Pursuant to this agreement, four loads of mangos were shipped from Mexico to respondent's place of business in Los Angeles on August 29, 1984, September 4, 1984, September 5, 1984, and September 6, 1984.

5. On September 20, 1984, one of the four loads was transferred to a company known as Produce Products who assumed responsibility for the marketing of the mangos. It was the transfer of this load that resulted in the amount claimed as damages being reduced at the hearing.

6. The parties agreed that the first shipment was federally inspected on August 31, 1984, Report No. G. 012512. The pertinent results of the report are as follows:

Condition: Mostly firm ripe, many ripe, some hard. Ground color mostly turning yellow to yellow, many-green. From 1 to 4 fruits per sample (13 to 40%), average 26% black discolored areas, average 5% soft bruises scattered throughout pack. Average less than 1/2 of 1% decay.

Remarks: Inspection and certificate restricted to produce on 10 accessible pallets.

7. Respondent has failed to remit any money to complainant for the three loads which it received.

8. The formal complaint was filed on February 18, 1985, and was within nine months after the cause of action herein accrued.

CONCLUSIONS

This case involves a dispute over what was intended by the parties when they sought to enter into an oral contract for the marketing of complainant's mangos. Complainant asserts that the agreement was that it would receive a minimum of \$4.50 per box. Respondent, on the other hand, alleges that this agreement was a typical consignment sale whereby respondent was to sell these goods for the highest price possible in exchange for an 18 percent commission.

An examination of Mr. Nolan's testimony on behalf of NSG illustrates the problem. Mr. Nolan testified that in his telephone conversation with Mr. Cliff Cavasos, respondent's employee, he agreed

that respondent would receive the standard 18 percent commission, and then Mr. Cavasos asked what complainant wanted for the mangos. Mr. Nolan told him NSG had a little over \$3.50 per box invested in them and they wanted \$1.00 per box profit or \$4.50 per box. Mr. Cavasos then told him to send the loads to Union (see, e.g., Tr. 16, 49, 67). What is unclear is whether Mr. Cavasos agreed to pay \$4.50 per box or whether, after calculating that deducting his 18 percent of the current market price of \$5.50 per box would still leave Mr. Nolan with the \$4.50 he wanted, Mr. Cavasos simply agreed to handle the mangos on a consignment basis.

Complainant has the burden to prove by a preponderance of the evidence the terms of the contract. Here there is testimony that the 18 percent commission was arrived at because it was the standard industry charge. It is, however, also standard industry practice to make that charge when goods are sold on a consignment basis. While not denying the honesty of Mr. Nolan's beliefs it is unlikely that respondent would have entered into a contract such as described by Mr. Nolan. The contract Mr. Nolan believed he was entering into provided a guarantee of \$4.50 per box, and respondent would get an 18 percent commission only so long as the mangos sold for \$5.50 or higher. See Tr. 68. Such a contract means that respondent assumed all the risk that fruit that it had never seen would bring at least \$5.50 per box. If it brought less than \$4.50, respondent would not only not receive any payment for its services but would lose money. Unfortunately Mr. Cavasos was not called as a witness, leaving this tribunal to draw what inferences it can from the evidence. We infer that it was unlikely that Mr. Cavasos intended to enter into such a one-sided agreement. Rather we find that the evidence shows that Mr. Cavasos intended to enter into the standard consignment contract and his statement "okay, send them" was not a guarantee of \$4.50, but rather a recognition that the pricing might work out in such a way that Mr. Nolan would receive his desired \$4.50.

There was, therefore, no agreement as to price, a critical term of the contract. It is fundamental that where there is a mutual mistake of a material fact between parties negotiating a contract, no contract comes into being. *Cello Vegetable & Produce Co. v. John H. Grant Company*, 18 Agric. Dec. 694 (1959); *Mendelson-Zeller Co. v. Schwartz Produce Com. Inc.*, 15 Agric. Dec. 1140 (1956). Respondent, in the absence of a contract, is liable for the reasonable market value of the mangos. *Vukasovich, Inc. v. W. Chas. Heitmiller Co., Inc.*, 32 Agric. Dec. 1394 (1973). Normally, market value is proved by the proceeds obtained from a prompt and proper resale by the receiver, respondent herein. In this case, however, the evidence

shows that complainant had one load moved to another company because respondent was not, in its view, moving promptly to resell the mangos. Additionally, respondent did not provide accounts of sale showing disposition of the mangos, but merely a statement showing that after expenses and deducting an 18 percent commission, the net proceeds were \$10,458 for the first shipment, \$7,411.44 for the second shipment and \$4,427.85 for the third. There is no showing as to the time period over which the mangos were sold. Respondent has failed to show, therefore, that the purported new proceeds were the result of a prompt and proper resale.

Respondent did submit inspection reports purportedly pertaining to the loads. Complainant challenged the applicability of inspection report number G124262 dated September 22, 1984, alleging that it no longer had mangos at respondent's warehouse on the 22nd, and also inspection report number G012572 dated September 7, 1984 alleging that since it never shipped over 3208 cartons, this inspection report covering 3500 cartons could not be their product. It is not necessary to the resolution of this case, however, to resolve the question of whether these are the proper inspection reports because complainant stipulated that inspection report number G012512 dated August 31, 1984 was for the inspection of its first load (Tr. 33), and testified that all the remaining loads were similar in quality (Tr. 95).

A review of the inspection report for the first load shows that there was an average of 26% black discolored areas and an average of 5% soft bruises. It would certainly be inappropriate to grant complainant \$4.50 per box for mangos with this much damage. The damage was apparently due to breakdown in the refrigeration in the trucks, but inasmuch as complainant arranged for the shipping it must bear the responsibility of the breakdown in equipment.

In determining the reasonable value of the goods, therefore, there is no alternative but to refer to the Market News reports compiled by the Department of Agriculture. Official notice may be taken of relevant market price quotations from applicable Federal Market News Service reports. *Artco Distributors, Inc. v. Mandell, Spector, Rudolph Co.*, 24 Agric. Dec. 1155 91965). The Market News Reports for the Los Angeles, California market during the period August 29, 1984 through September 12, 1984, the period in which the mangos were shipped, and an additional five days after the last load was received showed, a range of \$4.50-\$5.00 on August 29, 1984 to a price of mostly \$5.50 to 6.00 on September 12, 1984. The price on most days during this period was approximately \$5.50. See Los Angeles Wholesale Fruit and Vegetable Report, Volume LXX, No. 169-178, August 29, 1984 through September 12, 1984. There

was no specific price quotation for poorer quality fruit. It is noted, however, that on August 24, 1984, approximately one week earlier, mangos in poorer condition were selling for \$1.50-3.00 at a time when good fruit was selling in the \$3.50-4.50, mostly \$4.00-4.50 range. *Id.*, No. 166, August 24, 1984. The market price apparently went up approximately \$1.00 between August 24, 1984 and the period in question. We will, therefore, assume that the price of mangoes in poorer condition also went up \$1.00, meaning that mangos such as those shipped by complainant should have been sold for between \$2.50-\$4.00 per box. Having no other basis which to compute a reasonable value, we have determined to assess a value of \$3.50 a box for the mangos shipped to respondent. In doing so, we have noted the unverified testimony that complainant received \$3.20 per box on the fourth load. We have given a slightly higher value to the other loads because of the approximately two week delay in marketing the fourth load. Complainant shipped a total of 9,399 boxes of mangos which at \$3.50 per box had a value of \$32,896.50. Respondent's 18 percent commission is \$5,921.37 leaving a net value of \$26,975.13.

Respondent has failed to pay any money on these loads. Its failure to pay \$26,975.13 to complainant is a violation of section 2 of the Act. Reparation should be awarded to complainant in the amount of \$26,975.13, with interest.

Although the parties were provided an opportunity to claim necessary fees and expenses, neither party did so. Therefore, none will be awarded.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$26,975.13, with interest thereon at the rate of 13 percent per annum from November 1, 1984, until paid.

Copies hereof shall be served upon the parties.

JAN T. KING and SANDRA M. KING d/b/a KING PACKING v. AGRA, INC. PACA Docket No. 2-6952. Decided September 9, 1986.

Compromise settlement—Broker's confirmation—Failure to object.

Respondent purchased, received and accepted a truck lot of avocados. After arrival, the parties agreed to a compromise settlement indicated by a sworn statement of the broker and complainant's failure to object upon receiving the broker's confirmation evidencing such settlement. Respondent liable only for the amount of the settlement.

Andrew Stanton, Presiding Officer.

Thomas R Oliveri, Newport Beach, California, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$2,712.00 in connection with the sale and shipment of a trucklot of avocados to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement, but respondent elected not submitted any additional evidence. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Jan T. King and Sandra M. King d/b/a King Packing, is a partnership whose address is 300 East 5th Street, Camarillo, California.

2. Respondent, Agra. Inc., is a corporation whose address is 113 New England Produce Center, Chelsea, Massachusetts. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately September 25, 1984, complainant sold to respondent a trucklot of avocados consisting of 120 cartons of 48's at \$8.20 per carton and 240 cartons of 40's at \$7.20 per carton, for a total contract price of \$2,712.00, f.o.b. Richard Kaiser Co., Inc., Salinas, California, acted as the broker in this transaction, through whom both parties communicated.

4. Upon receipt of the avocados, respondent had them federally inspected. The October 1, 1984, inspection revealed an average of

6% decay, with pulp temperatures ranging from 55 to 57° F. Respondent reported these results to the broker, who contacted complainant's Jan King. Mr. King claimed that there was abnormal transportation, evidenced by the high pulp temperatures.

5. In November 1984, respondent informed the broker that it would be needing an allowance of \$2,000.00. The broker discussed the situation with complainant's Mr. King who, on November 25, 1984, at 3:30 p.m., informed the broker that he agreed to a compromise settlement of \$2.00 per carton for the 40's, with no charge for the 48's. On November 25, 1984, the broker issued a "Confirmation-Change of Order" which reflected the facts of the settlement agreed to by Mr. King. A copy of this document was sent to complainant, who received it without objection. Respondent has provided complainant with an account of sales showing the results of the avocados and a check for \$455.00 intended as full payment. Complainant has refused to accept the check.

6. The Department has received a letter from Richard Kaiser, president of the broker, dated February 15, 1985, concerning the transaction at issue. In that letter, Mr. Kiser states in relevant part as follows: "In November Agra reported that he would be needing allowances in excess of \$2,000.00. Upon speaking to Jan King he was not happy, but we thought, accepted the settlement. It wasn't until his receipt of Agra's check and King Packing's subsequent complaint to Western Growers that we discovered otherwise."

7. A formal complaint was filed on July 2, 1985, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

Respondent admits purchasing, receiving, and accepting the trucklot of avocados consisting of 120 cartons of 48's and 240 cartons of 40's. Respondent claims that complainant breached its warranty of suitable shipping condition, as the October 1, 1984, federal inspection taken upon arrival revealed an average of 6% decay. Complainant argues that the warranty was inapplicable, as transportation conditions were abnormal, which is indicated by the high pulp temperatures reported by the inspection. However, it is immaterial whether or not there was breach of warranty by complainant, as it is clear that the parties agreed to a compromise settlement on November 25, 1984.

The broker in this transaction, through whom the parties communicated, has stated in a February 15, 1985, letter to the Department (Finding of Fact 6) that in November, respondent reported that it needed an allowance of \$2,000.00. The broker claims that

"[u]pon speaking to Jan King he was not happy, but we thought, accepted the settlement." The broker issued a "Confirmation-Change of Order" on November 25, 1984, which states that on 3:30 p.m. on November 25, 1984, complainant's Jan King agreed to a settlement of \$2.00 per carton f.o.b. for the 40's and no charge for the 48's. The broker sent a copy of this document to complainant, who received it without objection (Finding of Fact 5). Complainant denies agreeing to the settlement, arguing that the broker admitted only that he "thought" complainant accepted the settlement. However, this argument is undercut by complainant's failure to object to the broker's confirmation. We have held that such failure is evidence of the contract terms set forth in such confirmation. *Agvest Incorporated v. Parker Fruit Corporation*, 37 Agric. Dec. 1104 (1978).

Accordingly, we conclude that the parties agreed to a settlement for \$2.00 per carton for the 240 cartons of 40's, or \$480.00, and no charge for the 48's. Respondent is thus liable to complainant for \$480.00, and its failure to pay such sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the day of this order, respondent shall pay to complainant, as reparation, \$480.00, with interest thereon at the rate of 13 per cent per annum from January 1, 1985, until paid.

Copies of this order shall be served upon the parties.

SMITH POTATO, INC., v. WOOD BROS. PRODUCE. PACA Docket No. 2-6990. Decided September 9, 1986.

Jurisdiction over respondent—Actual or apparent authority given to individual to make purchase for respondent—Trucker who converts load has no title to pass—Invoice is evidence of contract price if not timely objected to.

Respondent was subject to the jurisdiction of the Act at the time of the purchase, as it was licensed. Respondent gave either actual or apparent authority to Mr. Baker to purchase potatoes on behalf of respondent. Respondent did not have good title to the potatoes, as it bought them from a trucker who had converted them, and thus had no title to pass. Respondent thus liable for the contract price, evidenced by complainant's invoice which respondent received without objection.

Andrew Stanton, Presiding Officer

Pro se, for complainant.

Jean L. Perrin, Lexington, South Carolina, for respondent

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$4,462.00 in connection with the sale of a truckload of potatoes in the course of interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Respondent filed an answering statement and complainant filed a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Smith Potato Inc., is a corporation whose address is P.O. Box 467, Hart, Texas.

2. Respondent, Wood Bros. Produce, is a partnership whose address is P.O. Box 13491, Columbia, South Carolina. At the time of the transaction involved herein, respondent was licensed under the Act, pursuant to a license issued on September 21, 1983, effective until September 21, 1984. That license showed respondent as consisting of B.R. Wood and Troy E. Wood as partners. Troy E. Wood renewed the license on October 19, 1984, without indicating any change in the licensee.

3. On approximately August 18, 1984, complainant loaded onto a truck 850 50 pound bags of U.S. number one potatoes consisting of 416 bags of 2-8 Russetts, 45 bags of 70 ct. Russetts, 50 bags of jo. Russetts, and 339 bags of A-size reds. The potatoes were for delivery to four firms in New Orleans, Louisiana; A.J.'s Produce,

Market Place Produce, M & M Produce, and Bubba Produce. In the course of transit, the truckdriver converted the potatoes, delivering them to respondent in Columbia, South Carolina, who was not a party to the original contract. The potatoes were received at respondent's place of business by respondent's employee, Mike Baker, who paid the driver \$2.00 per bag.

4. On August 19, 1984, complainant was informed by the F.B.I. that it had located the stolen potatoes at respondent's place of business. Complainant's president, David Smith, contacted respondent's Mike Baker and demanded payment for the potatoes, stating that he would be sending an invoice for \$4,462.00. Complainant sent respondent an invoice for \$4,462.00 dated August 22, 1984, which was received by respondent without objection.

5. Respondent has refused to make any payment to complainant for the potatoes.

6. A formal complaint was filed on April 15, 1985, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

Respondent denies that it is subject to the jurisdiction of the Act. Respondent claims that at the time of the events alleged in the complaint, Wood Brothers Produce, a partnership consisting of Troy E. Wood and B.R. Wood, had been dissolved, due to the death of B.R. Wood several years earlier. Respondent contends that the actions attributed to respondent were actually done by Mike Baker, acting as a sole proprietor, although respondent admits in its answer that Mr. Baker was doing business as Wood Brothers Produce. Respondent also claims that Mr. Baker was not subject to license under the Act. In addition, respondent claims that it is free from liability, as it purchased the potatoes from the truckdriver in good faith and in the ordinary course of business.

The first issue to be resolved is whether respondent was subject to the jurisdiction of the Act during the time of the transaction at issue, August 1984. The report of investigation indicates that respondent was not licensed during this period. This statement is in error, as the Department's license records, of which we take judicial notice, show clearly that on September 21, 1983, licence number 792069 was issued to respondent to extend until September 21, 1984. That license shows respondent as a partnership composed of B.R. Wood and Troy E. Wood. Troy E. Wood renewed the license on October 19, 1984, for an additional year, with no indication on his renewal form of any change in the licensee. Therefore, even if the partnership between Troy E. Wood and B.R. Wood dissolved

years ago upon the death of B.R. Wood, it is clear that respondent was a licensee under the Act through August 1984, and beyond.

Respondent insists that the potatoes were purchased by Mike Baker, a sole proprietorship, although it admits in its answer that Mr. Baker was doing business as Wood Brothers Produce. It is apparently respondent's argument that the acts of Mr. Baker should not be imputed to respondent, the licensee. However, respondent's claim that it was not involved in the transaction at issue is highly dubious in view of respondent's admission that Mr. Baker was doing business under respondent's name, and the clear evidence in the Department's license records that respondent was licensed under the Act at that time. However, even if Mr. Baker was not given any actual authority by respondent to purchase the potatoes, it is evident that Mr. Baker had the apparent authority to do so. Apparent authority is defined as authority which though not actually granted, the principal knowingly permits the agent to exercise, or which the principal holds the agent out as possessing. *Gulf & Western Food Products Co. v. Prevor-Meyersohn International, Inc.*, 34 Agric. Dec. 1911 (1975). We can assume from respondent's answer that it knew Mr. Baker was doing business under respondent's name at the time he purchased the potatoes. Thus respondent held out Mr. Baker as possessing the authority to do business on respondent's behalf. This conclusion is supported by the fact that complainant sent respondent an invoice dated August 22, 1984, in the amount of \$4,462.00 for the load of potatoes, and respondent does not deny receiving such invoice without objection. Further, respondent did not even deny its involvement in the transaction until its October 21, 1985, answer. Mr. Baker thus had the apparent authority to make the purchase on behalf of respondent.

Respondent claims that it should nonetheless be free from liability because under section 36-2-403 of the Uniform Commercial Code in effect in South Carolina, respondent was a buyer in the ordinary course of business and took good title from the trucker. Respondent is in error. Section 2-403 reads as follows, in relevant part: "1. A purchaser of goods acquires all title which his transferor had or had power to transfer. . . . A person with voidable title has power to transfer a good title to a good faith purchaser for value." However, in the present case, the potatoes were sold to respondent by the trucker, a bailee, to whom the potatoes had been entrusted for delivery to four firms in New Orleans. The trucker did not have a voidable title, but had no title to the potatoes at all. Therefore, there was no title which could have been transferred to respondent. Section 2-403 of the Uniform Commercial Code does not alter this well established principle, as is clearly set forth in 3

Anderson, *Uniform Commerical Code*, § 2-403:28 (at 585) and the numerous cases cited therein:

The fact that a bailor entrusts the bailee with possession of his property does not give the bailee any ability or power to make an effective sale of the property and the bailor may recover the property from a third person.

When a bailee purports to sell the goods to a dealer and the goods are then purchased by a good faith purchaser for value, no title passes to the latter because the bailee did not have a voidable title but had no title.

Respondent purchased, received and accepted the load of potatoes and is therefore liable to complainant for the contract price. Complainant's president, David Smith, asserts that on approximately August 21, 1984, he spoke to Mr. Baker of respondent, and they agreed that respondent was going to purchase the potatoes at certain specific prices, which Mr. Smith set forth in an invoice and mailed to respondent. Respondent does not deny that this conversation took place, nor that it received the invoice without objection. Therefore, we conclude that the contract price for the potatoes was as set forth in the invoice, or \$4,462.00. *Sunshine Produce Company v. Si Si Fruit Distributors, Inc.*, 34 Agric. Dec. 104 (1975). Respondent's failure to pay complainant this sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$4,462.00, with interest thereon at the rate of 13% per annum from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

HOMESTEAD TOMATO PACKING CO., INC. v. ALBEE TOMATO CO., INC.
PACA Docket No. 2-6972. Decided September 12, 1986.

Price terms.

The parties agreed that the quoted prices would be in effect only if they held for a five day period. Market News Report listing shows that they held. Therefore, respondent liable for the quoted price.

Andrew Stanton, Presiding Officer.
Complainant and respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$12,800.00 in connection with the sale and shipment of a trucklot of tomatoes to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and file briefs, but declined to do so.

FINDINGS OF FACTS

1. Complainant, Homestead Tomato Packing Co. Inc., is a corporation whose address is P.O. Box 3064, Florida City, Florida.

2. Respondent, Albee Tomato Co. Inc., is a corporation whose address is Stores 118-120, Row A, New York City Terminal Market, Bronx, New York. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On January 18, 1985, complainant sold to respondent a trucklot of tomatoes consisting of 800 cartons of 6×6 tomatoes and 800 cartons of 6×7 tomatoes, 85% or better U.S. number one, f.o.b.

4. The parties agreed on a price of \$18.00 per carton for the 6×6 tomatoes and \$16.00 per carton for the 6×7 tomatoes, plus \$.50 per carton for gassing, \$.15 per carton for pallets, and \$22.50 for a Ryan temperature recorder, for a total of \$28,262.50. It was understood that the tomato prices would be in effect only if the Florida f.o.b. market structure maintained such prices until January 23, 1985. The contract was negotiated through a broker, Stan Scherer Marketing Services, Inc., Miami, Florida, with whom both parties communicated. Shortly after the contract was negotiated, the

broker issued a confirmation of sale reflecting the agreed upon contract terms, except that it did not set forth any prices for the tomatoes.

4. The tomatoes were treated with gas. On January 23, 1985, at respondent's request, the tomatoes were removed from the gassing facility and shipped in interstate commerce to respondent, where they arrived and were accepted.

5. Respondent has paid complainant \$15,462.50, leaving \$12,800.00 allegedly due and owing.

6. A formal complaint was filed on October 4, 1985, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

There is no dispute herein over the quality and condition of the trucklot of tomatoes which respondent admittedly received and accepted. The only point of contention concerns the agreed upon contract price. Respondent claims that at the time of the sale, January 18, 1985, it was agreed that the prices quoted by complainant, \$18.00 per carton for the 6×6 tomatoes and \$16.00 per carton for the 6×7 tomatoes, would be in effect only if the Florida tomato f.o.b. market structure held at these prices through January 23, 1985.

In a May 13, 1985, letter to the Department, which is part of the report of investigation, the broker generally confirms respondent's account of the pricing arrangement between the parties. We thus assume that respondent's version of the pricing is correct. Therefore, the dispositive question is whether on January 23, 1985, when respondent had the tomatoes removed from the gassing facility and shipped to its place of business, the Florida f.o.b. market was still holding at the prices quoted by complainant. Respondent claims that during the period January 23 to 25, 1985, the entire Florida market structure was pricing 6×6 tomatoes at \$8.00 per carton and 6×7 tomatoes at \$5.00 per carton. However, respondent has provided absolutely no proof of the existence of these prices. More convincing evidence of the f.o.b. prices can be found in the Market News Service Reports for Winterhaven, Florida, of which we take judicial notice. These reports show prices per carton on January 21, 1985, at \$9.00 to \$10.00, mostly \$9.00 for 6×6 tomatoes, and \$7.50 to \$8.00 for 6×7 tomatoes; no listings for January 22, or 23, 1985; and on January 24, 1985, \$18.00 for 6×6 tomatoes and \$16.00 for 6×7 tomatoes. The available listing which most accurately reflects the prevailing f.o.b. prices for Florida tomatoes on January 23, 1985, is that of January 24, 1985, showing prices of \$18.00 per carton for the 6×6 tomatoes and \$16.00 per carton for the 6×7 to-

atoes, exactly the same as those agreed to by the parties. It is, therefore, clear that these were the prices to be applied on January 23, 1985.

The contract prices for the tomatoes were thus \$18.00 per carton for 800 cartons and \$16.00 per carton for 800 cartons, plus \$.50 per carton for gas, \$.15 per carton for pallets, and \$22.50 for a Ryan recorder, for a total of \$28,262.50. Deducting from this sum the \$15,462.50 which respondent has already paid leaves \$12,800.00. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$12,800.00, with interest thereon at the rate of 13% per annum from March 1, 1985, until paid.

Copies of this order shall be served upon the parties.

FRESH WESTERN MARKETING, INC., v. INTERNATIONAL A.G., INC.
PACA Docket No. 2-7252. Decided September 26, 1986.

Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$58,363.60 in connection with shipments of mixed vegetables in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including indebtedness to complainant in the amount of \$57,850.40. Complainant, in a letter dated August 7, 1986, agreed to accept the amount of \$57,850.40 as payment in full. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Fresh Western Marketing, Inc., is a corporation whose address is P. O. Box 5275, Salinas, California. Respondent, International A.G., Inc., is a corporation whose address is 1930 N.W. 23rd Street, Miami, Florida 33142. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$57,850.40. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$57,850.40, with interest thereon at the rate of 13 percent per annum from April 1, 1986, until paid.

Copies of this order shall be served upon the parties.

M & C P FARMS v. LLOYD MYERS CO. INC. PACA Docket No. 2-6873.
Decided September 29, 1986.

Burden of proof—Duty of broker—Grower makes accomodation purchase.

Where complainant proves broker sold produce for lower price than authorized, broker liable for difference between that price and authorized price. Where broker collects on behalf of seller, he is required to remit the money to seller. A grower which makes an accomodation purchase for its broker is not a dealer where purchase is isolated transaction, but grower should not be allowed to profit on transaction.

Edward M. Silverstein, Presiding Officer.

John N. Bach, Chico, Calif., for complainant.

Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation in the amount of \$69,180.25 against respondent in connection with five transactions in interstate and/or foreign commerce involving olives, a perishable agricultural commodity.

A copy of the report of investigation was served upon the parties. In addition, respondent was served with a copy of the formal complaint. It filed an unverified answer thereto generally denying the allegations of the complaint, and also filed a counterclaim against complainant in the amount of \$5,000.00 in connection with the same transactions which are made the subject of the complaint.

A hearing was held on March 4, 1986, before Presiding Officer Edward M. Silverstein. At the hearing, complainant was represented by John N. Bach, Esq., 2575 Cohasset Road, Chico, California

95927, and respondent was represented by its president, Lloyd Myers.

FINDINGS OF FACT

1. Complainant, M & C P Farms, is a partnership consisting of Maurice Penna and his wife Cynthia Penna, whose mailing address is Route 1, Box 1694, Orland, California 95963. Complainant was not licensed, nor was it operating subject to license, under the Act during any material time.

2. Respondent Lloyd Myers Co., Inc., is a corporation whose last known mailing address was P.O. Box 55818, Valencia, California 91355. At all material times, respondent was licensed under the Act, or operating subject to license.

3. On or about October 5, 1984, in the course of interstate commerce, complainant sold to James Corotto Produce, Inc. ("Corotto"), 1578 Main Avenue, Clifton, New Jersey 07011, one truckload of se-villano olives consisting of 1,080 cartons, through respondent acting as a broker. Complainant had instructed respondent to sell the olives at a price not less than \$10.25 per carton plus 25¢ per carton to cover brokerage, or \$10.50 per carton f.o.b. Orland, California. This load was shipped on or about October 15, 1984, and was received and accepted by Corotto. Complainant invoiced Corotto at a price of \$10.50 f.o.b. per carton. Corotto, claiming that it only had agreed with respondent to pay \$10.00 per carton, remitted \$10,800, or \$10.00 per carton, to complainant. Respondent failed to issue a brokers memorandum of sale with regard to this shipment.

4. On or about October 6, 1984, in the course of foreign commerce, complainant sold to La Maison De Fruits Et. Le Gumes Supra, Inc. ("La Maison"), 362 Cremazie St. West, Montreal, Quebec, Canada HZPIC7, 1,006 cartons of manzanillo olives at an agreed f.o.b. price of \$8.50 per carton (\$8,551.00), and 506 cartons of se-villano olives at an agreed f.o.b. price of \$11.50 per carton (\$5,796) for a total agreed f.o.b. price of \$14,347.00, through respondent acting as a broker. On or about the same date, respondent issued a confirmation of sale indicating the above terms, and also indicating that complainant owed it \$377.50 (or 25¢ per carton) for brokerage. The load of olives was received and accepted by La Maison.

5. On or about October 13, 1984, in the course of foreign commerce, complainant sold to La Maison, 612 cartons of manzanillo olives at an agreed f.o.b. price of \$8.50 per carton (\$5,202) and 900 cartons of se-villano olives at an agreed f.o.b. price of \$11.50 per carton (10,350) for a total agreed f.o.b. price of \$15,552.00, through respondent acting as a broker. The load of olives was received and

accepted by La Maison. Respondent failed to issue a broker's memorandum of sale with regard to this shipment.

6. On or about October 20, 1984, in the course of foreign commerce, complainant sold to La Maison, 1,944 cartons of seville olives at an agreed f.o.b. price of \$11.50 per carton for a total agreed f.o.b. price of \$22,356.00, through respondent acting as a broker. The load of olives was received and accepted by La Maison. On October 24, 1984, 724 cartons from this load were subjected to a Canadian inspection. The inspector reported that the olives were in La Maison's warehouse, and that their condition was as follows: "50% bruised. 29% showing black discolored spots or areas (affecting app. 5% of the surface in aggregate) 2% decay." Respondent failed to issue a broker's memorandum of sale with regard to this shipment.

7. On or about October 25, 1984, complainant, in the course of interstate and foreign commerce, sold to La Maison 1,341 carton of seville olives at an agreed f.o.b. price of \$11.25 per carton for a total agreed f.o.b. price of \$15,086.25. The load of olives was received and accepted by La Maison. Respondent failed to issue a brokers memorandum of sale with regard to this shipment.

8. Complainant invoiced La Maison for the shipments described in §§ 4, 5, and 6 above, and respondent for the shipment described in § 7 above, in accordance with the agreements described in those paragraphs, but has received no payment from either except as described in § 11 below.

9. On or about October 24, 1984, complainant, on behalf of respondent and at the personal request of Lloyd Myers, respondent's president, purchased 291 buckets of processed Sicilian style olives for \$4,107.26 from West Coast Products Corporation, whose mailing address is P.O. Box 623, Orland, California 95963. Respondent advanced complainant \$5,000.00 to make this purchase for him.

10. During the period October 24, 1984, through November 6, 1984, La Maison paid respondent who was authorized to collect on complainant's behalf, the total sum of \$52,739.70 with respect to the olive shipments described in §§ 4, 5, 6, and 7. The total represents the sum of five checks, to wit: No. 5071-\$17,776.80; No. 5149-\$13,442.40; No. 5150-\$14,145.00; No. 5239-\$6,705.00; and No. 5240-\$670.80.

11. On or about November 21, 1984, respondent sent complainant a check in the amount of \$21,271.15, with respect to the October 6, and October 13, 1984, shipments described in §§ 4 and 5 above. In computing the amount due complainant, respondent deducted the \$5,000 advance referred to in § 9 above, plus the \$20 fee for purchasing the checks used for the advance. Complainant endorsed the

\$21,271.15 check as follows: "This instrument does not reflect pmt [sic] in full of mentioned invoices on front of check. Advance pmt [sic] does not pertain to any fresh fruit sales—." When the endorsed check reached respondent, it refused to accept the conditional endorsement, and the check was returned to complainant through banking channels.

12. All of the fresh olives sold by complainant to, or through, respondent were grown on land it owned or leased.

13. On or about January 19, 1985, complainant filed an administrative proceeding against La Maison before the Agriculture Canada, Food Production and Inspection Branch, pursuant to the Canadian Agricultural Products Standards Act. This action was voluntarily dismissed and, on or about September 20, 1985, complainant filed an action against La Maison before the Superior Court, District of Montreal Province of Quebec, Canada, designated as docket no. 500-05-008360-859, seeking payment of \$66,513.25, with respect to the olives shipped to La Maison as described in §§ 4, 5, 6, and 7, above. In response thereto, La Maison filed an answer indicating that the only sum owing to complainant with respect to those shipments was \$52,739.70 and that said amount had been paid to respondent as agent for complainant. La Maison, also, indicated that 724 cartons of the olives had arrived in a deteriorated condition.

14. The complaint was filed on February 12, 1985, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

In this reparation proceeding, complainant seeks \$69,180.25 from respondent as a consequence of respondent's alleged violations of the Act with respect to five shipments of fresh olives. At the hearing held on this matter, at complainant's request, the verified complaint and reply to respondent's counterclaim were made a part of the record herein and complainant presented one witness and three exhibits. Respondent presented no witnesses. However, at respondent's request, the deposition of Maurice Penna was made part of the record and respondent presented six documents which it had subpoenaed from complainant as exhibits. In addition, two more documents which had been subpoenaed from complainant by respondent, were made part of the record by the Presiding Officer.¹

¹ One of these documents, the answer of La Maison in the civil proceeding brought by complainant, was entered into evidence, as Exhibit D, at the hearing. The other document, the complaint filed by complainant in the same civil proceeding, was attached to complainant's brief pursuant to the order of the Presiding Offi-

The complainant alleged that respondent violated the Act by failing "to perform the duties and specifications of a broker" in that it had agreed with the buyers thereof to sell the subject five shipments of olives at a lower price than was agreed to by complainant, and by failing to remit amounts collected on its behalf from one buyer.² As to all of its affirmative allegations, complainant has the burden of proof. *New York v. Sandler*, 32 Agric. Dec. 707 (1973).

The only transaction for which complainant provided substantive evidence supporting its allegation that respondent failed to negotiate a price agreed to by it was that with Corotto. Complainant invoiced Corotto at a price of \$10.50 per carton, but was told by Corotto that it had only agreed with respondent on a price of \$10.00 per carton and remitted on this basis. As there was no brokers memorandum of sale issued for this transaction and no memorandum of agreement between complainant and respondent as to the amount at which respondent was authorized to sell the olives, the only substantive evidence in the record on this point is the testimony of complainant's witness Maurice Penna who negotiated its agreement with respondent. Mr. Penna testified that he only authorized respondent to sell the olives for \$10.25 plus 25¢ brokerage, or \$10.50, per carton. Although respondent had denied this allegation in its unverified answer, it did not seek to rebut Mr. Penna's testimony. We, therefore, must conclude that complainant has satisfied its burden of proving, by a preponderance of the evidence, that respondent had violated its duty by agreeing to sell the olives for a lesser price than agreed upon by complainant. Consequently, it is liable to complainant for the difference between the price agreed upon by complainant (\$10.50) and the price at which it agreed to sell the olives to Corotto (\$10.00), or 50¢ per carton, or a total of \$540.

With regard to the remaining four transactions made the subject of the complaint, i.e., the sales to La Maison, it is not clear to us that respondent agreed to sell the olives to it for a lower price than was agreed upon by complainant. Unlike Corotto transaction, there

cer and was made part of the record, although not identified by an exhibit number, by virtue of the Presiding Officer's order.

² Complainant alleged in its complaint, although it did not offer evidence supporting this allegation, that, as to the last of these loads, respondent was the purchaser. However, it appears that complainant has taken an inconsistent position with regard to this allegation in bringing an action in Canada against La Maison for this shipment. In view of the manner in which the other transactions at issue were handled, we do not believe that respondent agreed to perform other than as a broker with regard to this shipment. See *Florida Tomato v. New England*, 32 Agric. Dec. 488 (1973).

is no evidence that respondent agreed with the buyer to sell the olives at a lower price than complainant had agreed upon. Rather the evidence in the record, in particular the one broker's memorandum of sale issued by respondent with respect to these sales, would seem to support a conclusion that respondent did not do so.³ Therefore, as to these transactions, we must hold that complainant failed to sustain its burden of proving that respondent had violated the Act by agreeing with La Maison to sell the olives at a price lower than authorized by complainant. In doing so, we are cognizant of the fact that respondent was paid a lesser amount by La Maison than it was billed by complainant. However, it appears that La Maison may have received some damaged olives and thereby suffered some damages. Such matters currently are being litigated between complainant and La Maison before a Canadian court and we decline to engage in any prognostication as to the result of that litigation.

Complainant has proven that respondent received \$52,739.70 from La Maison with respect to the subject shipments. The \$52,739.70 should have been remitted to complainant. Consequently we hold that respondent is liable to complainant in the amount of \$52,739.70 with respect to these transactions.

Respondent has filed a counterclaim against complainant in the amount of \$5,000. It has the burden of proving, by a preponderance of the evidence, that it is entitled to such amount. *Bushwich Comm'n Co. v. Maloney*, 18 Agric. Dec. 1029 (1959). The \$5,000 for which respondent seeks reimbursement was advanced by respondent to complainant so that complainant might purchase, on behalf of respondent, 291 buckets of processed olives from a third party. Such a purchase was made by complainant for \$4,107.26, but is not indicative of a course of business engaged in by complainant.⁴ However, since such a purchase was not made during the course of complaint's business but rather as an accommodation to respondent, it should not be allowed to make a 22% profit from it and, therefore, the \$892.74 it retained from the \$5,000 ought to be credited to the amount which respondent has been found to owe complainant.

³ We are cognizant of the fact that La Maison does not admit the full extent of indebtedness as alleged by complainant, however, that matter is not before us. Our ruling is simply that complainant has failed to prove that respondent agreed with La Maison to sell the olives for a lower price than agreed upon by complainant.

⁴ We conclude based on these facts that complainant did not operate subject to the Act during any period of time at issue here and therefore complainant was not operating subject to being licensed.

During the course of this proceeding, respondent has made no attempt to refute or rebut any of the evidence adduced by complainant. In fact, aside from offering some documents in evidence which it had subpoenaed from complainant, in a futile effort to show that complainant was operating subject to the Act, respondent offered no evidence whatsoever as to its affirmative allegations. Instead, in its defense, it merely generally denied the allegations of the complaint in its unsworn answer and relied upon its assertion that complainant failed to sustain its burden of proof in several regards: (1) that complainant is not a valid entity which owned the subject olives; (2) that it failed to prove that respondent was indebted to it; (3) that the Secretary has no jurisdiction over this matter; and (4) that it failed to prove that respondent purchased olives from complainant.⁵ To the extent that these claims have any merit they are discussed above.⁶

In view of the above, we conclude that respondent is obligated to complainant in the amount of \$52,386.96 (\$540 + \$52,739.70 - \$892.74), and that its failure to pay complainant this amount is a violation of the Act for which reparation plus interest should be awarded.

In addition, as complainant is the prevailing party, it is entitled to reasonable fees and expenses related to the hearing. Complainant has filed a claim for \$5,716.78 which is amply documented and has been served upon respondent. As respondent has not objected thereto, and as we find such claim to be reasonable, complainant further should be awarded \$5,716.78 as its fees and expenses.

ORDER

Within thirty days from this date of this order, respondent shall pay to complainant, as reparation, \$52,386.96 plus interest at the rate of 13% per annum from December 1, 1984, until paid.

Within thirty days from the date of this order, respondent shall pay to complainant, as further reparation, \$5,716.78 plus interest at the rate of 13% per annum from the date of this order until paid.

Except as indicated above, the counterclaim is dismissed.

⁵ Respondent also claims that a California statute precludes the complainant from filing this action because it did not file a "fictitious business statement." However, even if complainant was prevented from filing an action in a California court, such a bar is not applicable to actions filed under the Act.

⁶ Subsequent to the hearing, respondent filed a motion seeking removal of the presiding officer. As the motion was frivolous, the presiding officer was correct in not certifying the motion to the Judicial Officer and in denying it.

Copies of this order shall be served upon the parties.

TOM LANGE COMPANY, INC., v. DEMPSEY-SPENCE, INC. PACA Docket
No. 2-7273. Decided September 29, 1986.

Dennis Becker, Presiding Officer

Pro se, for complainant.

Pro se, for respondent

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$49,156.05 in connection with shipments of mixed fruit in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant, although respondent claimed in its answer that the indebtedness had been reduced to a balance of \$33,910.70. Complainant has verified that the reduced figure is the correct outstanding balance. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Tom Lange Company, Inc., is a corporation whose address is 3100 Produce Row, Room 2B, Houston, Texas 77023. Respondent, Dempsey-Spence, Inc., is a corporation whose address is P. O. Box 3483, Conroe, Texas 77305. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$33,910.70. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$33,910.70, with interest thereon at the rate of 13 percent per annum from May 1, 1986, until paid.

Copies of this order shall be served upon the parties.

INMAN FARMS, INC., v. SAM COMPTON PRODUCE COMPANY, INC.
PACA Docket No. 2-7019. Decided October 2, 1986.

Eric Paul, Presiding Officer.

Frank D. Upchurch, III, Upchurch, Bailey & Upchurch, St Augustine, Florida, for complainant.

Stephen P. McCarron, Sures, Dondero & McCarron, Silver Spring, Maryland, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$142,110.05 in connection with shipments of perishable agricultural commodities in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability. On August 6, 1986, respondent amended its answer to withdraw its denial and to admit to each of the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Inman Farms, Inc., is a Florida corporation whose address is P. O. Box 3776, St. Augustine, Florida 32084. Respondent, Sam Compton Produce Company, Inc., is a corporation whose address is 2208-14 Forest Avenue, Knoxville, Tennessee 37916. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$124,110.05 plus interest at the agreed contract rate of 12 per cent per annum. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$124,110.05, with interest thereon at the rate of 12 percent per annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

H. SMITH PACKING CORPORATION v. SAM COMPTON PRODUCE COMPANY, INC. PACA Docket No. 2-7054. Decided October 2, 1986.

Eric Paul, Presiding Officer.

Andrew Yaeger, Blaine, Maine, for complainant.

Stephen P. McCarron, Sures, Dondero & McCarron, Silver Spring, Maryland, for respondent

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$42,087.60 in connection with shipments of perishable agricultural commodities in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability. On August 6, 1986, respondent amended its answer to withdraw its denial and to admit each of the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, H. Smith Packing Corporation, is a corporation whose address is P.O. Box 189, Blaine, Maine 04734. Respondent, Sam Compton Produce Co., Inc., is a corporation whose address is 2208-14 Forest Avenue, Knoxville, Tennessee 37916. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$42,087.60. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$42,087.60, with interest thereon at the rate of 13 percent per annum from April 1, 1985, until paid.

Copies of this order shall be served upon the parties.

MAINE POTATO GROWERS, INC., v. SAM COMPTON PRODUCE COMPANY,
INC. PACA Docket No. 2-7063. Decided October 2, 1986.

Eric Paul, Presiding Officer.

Phillips, Olore, Walker & Dunlavey, Presque Isle, Maine, for complainant

Stephen P. McCarron, Sures, Donero & McCarron, Silver Spring, Maryland, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$214,280.38 in connection with shipments of perishable agricultural commodities in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability. On August 6, 1986, respondent amended its answer to withdraw its denial and to admit each of the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Maine Potato Growers, Inc., is a corporation whose address is Box 271, Parsons Street, Presque Isle, Maine 04769. Respondent, Sam Compton Produce Company, Inc., is a corporation whose address is 2208-14 Forest Avenue, Knoxville, Tennessee 37916. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$214,280.38. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$214,280.38, with interest thereon at the rate of 13 percent per annum from March 1, 1985, until paid.

Copies of this order shall be served upon the parties.

SUN-GLO OF IDAHO, INC., v. INTERNATIONAL A.G. INC. PACA Docket
No. 2-7253. Decided October 2, 1986.

Donald A. Campbell, Judicial Officer

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$1,807.50 in connection with shipments of potatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Sun-Glo of Idaho, Inc., is a corporation whose address is P. O. Box 98, Rexburg, Idaho. Respondent, International A.G., Inc., is a corporation whose address is 1930 N.W. 23rd Street, Miami, Florida. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$1,807.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$1,807.50, with interest thereon at the rate of 13 percent per annum from March 1, 1986, until paid.

Copies of this order shall be served upon the parties.

HILLCREST SALES, INC., v. INTERNATIONAL A.G., INC. PACA Docket
No. 2-7256. Decided October 2, 1986.

Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$28,462.00 in connection with shipments of plums and grapes in interstate com-

merce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Hillcrest Sales, Inc., is a corporation whose address is 555 E. City Line Avenue, Bala Cynwyd, Pennsylvania. Respondent, International A.G., Inc., is a corporation whose address is 1930 N.W. 23rd Street, Miami, Florida. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$28,462.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$28,462.00, with interest thereon at the rate of 13 percent per annum from April 1, 1986, until paid.

Copies of this order shall be served upon the parties.

RANCHO DOS PALMAS v. MARTIN MONTES d/b/a M&M PRODUCE
BROKERAGE and/or ANGELO DI GIACOMO. PACA Docket No. 2-
6827. Decided October 3, 1986.

Contracts—Manifested mutual assent necessary to formation of—Quasi contract—notice of other parties' interest necessary for equitable liability—Broker liable to shipper for contract price where his false statements resulted in shippers realizing such price.

Broker represented to shipper that he had negotiated a sale contract between shipper and buyer. Broker represented to buyer that the broker was selling the goods to buyer at different price. It was found that no contract was formed between shipper and buyer and that shipper gave buyer defective notice of shipper's interest in goods, so that buyer could not be held to any equitable liability to shipper. Broker was held liable to shipper for original contract price.

George S Whitten, Presiding Officer

Thomas R Oliveri, for complainant

Pro se, for respondent

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondents in the amount of \$8,995.20 in connection with two shipments of cantaloupes in interstate commerce.

A copy of the report of investigation made by the Department was served upon each of the parties. A copy of the formal complaint was served upon each respondent. Respondent Angelo Di Giacomo filed an answer to the complaint denying any liability to complainant. Respondent M & M Produce Brokerage defaulted in the filing of an answer.

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent Angelo Di Giacomo filed an answering statement, and complainant filed a statement in reply. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Rancho Dos Palmas, is a partnership composed of Michael W. Morgan and John C. Veysey, whose address is 3651 Austin Road, Brawley, California.

2. Respondent, Martin Montes, is an individual doing business as M & M Produce Brokerage, (hereafter Montes) whose address is 43 Dolores Street, Watsonville, California. At the time of the transactions involved herein this respondent was licensed under the Act.

3. Respondent, Angelo Di Giacomo, is a partnership composed of Joseph Pinto and Stanley J. Sussman, whose address is 3300 South Galloway Street, Philadelphia, Pennsylvania. At the time of the transactions involved herein this respondent was licensed under the Act.

4. On or about June 8, 1984, respondent Montes contacted complainant by telephone and secured complainant's agreement to sell to respondent Angelo Di Giacomo one lot consisting of 504 cartons of Rancho Dos Palmas cantaloupes, size 18, at \$8.00 per carton, plus 80 cents per carton for cooling and palletizing, and \$22.50 for a temperature recorder, for a total price of \$4,457.70. On or about the same day respondent Montes contacted respondent Angelo Di Giacomo by telephone, and secured such respondent's agreement to purchase from respondent Montes are lot consisting of 504 cartons of Rancho Dos Palmas cantaloupes, size 18, at \$8.00 per carton, plus 80 cents cooling and palletizing, plus 15 cents brokerage, plus one-half of the profits made from the resale of the cantaloupes.

5. On June 9, 1984, complainant shipped the cantaloupes from loading point in Brawley, California, to respondent Angelo Di Giacomo in Philadelphia, Pennsylvania, by truck. On June 11, 1984, complainant mailed respondent Angelo Di Giacomo an invoice reflecting the terms of sale represented to it by respondent Montes.

6. On or about June 13, 1984, respondent Montes contacted complainant by telephone, and secured complainant's agreement to sell to respondent Angelo Di Giacomo one lot consisting of 1050 cartons of Ranchos Dos Palmas cantaloupes of which 546 would be size 12 at \$5.00 per carton and 504 would be size 15 at \$6.00 per carton, and including a cooling and palletizing charge of 80 cents per carton for the entire load, plus \$22.50 for a Ryan temperature recorder, or a total of \$6,616.50 f.o.b.

7. On or about June 13, 1984, respondent Montes contacted respondent Angelo Di Giacomo by telephone, and secured such respondent's agreement to purchase from respondent Montes one lot containing 1,050 cartons of cantaloupes of which 504 would be size 15 at \$7.00 per carton, and 546 would be size 12 at \$5.00 per carton, plus 80 cents per carton for cooling and palletizing, and one-half of the profits.

8. On June 14, 1984, complainant invoiced respondent Angelo Di Giacomo on the basis of the contract terms represented to it by Martin Montes.

9. After both shipments of cantaloupes had been received and accepted by respondent Angelo Di Giacomo, respondent Montes contacted complainant, and negotiated a price adjustment downward of \$1.00 per carton for the shipment of June 9, and \$1.50 per carton for the shipment of June 13, on the basis of alleged poor condition on arrival.

10. On June 20, 1984, respondent Angelo Di Giacomo sent complainant the following letter:

Gentlemen:

As per instructions of Mr. Martin Montez of M & M Brokerage Co., we are returning to you Invoices #132-84: 6563; and 6563 A. Mr. Montez has stated to me that he is responsible for payment of these invoices.

11. On June 22, 1984, complainant sent new invoices covering each of the shipments of cantaloupes, and showing the respective price adjustments on each shipment. The new invoices in addition to showing the name and address of respondent Angelo Di Giacomo at the top under the printed heading "to" also showed under the printed heading "billed" the name and address of respondent Martin Montes d/b/a M & M Produce Brokerage Co. On the original invoices dated June 11, and June 14, 1984, the space opposite the word "billed" was left blank.

12. Apart from the mailing of the new invoices complainant made no response to the June 20, letter from respondent Angelo Di Giacomo.

13. On June 25, 1984, respondent Montes sent a telegram to respondent Angelo Di Giacomo which stated in relevant part as follows:

PLEASE HANDLE THE FOLLOWING FOR OUR
ACCOUNT: . . . LOAD SHIPPED 6/8/84 . . . 504 CANTALOUPE 18'S RANCHO DOS PALMAS LABEL LOAD
SHIPPED 6/13/84 . . . 546 CANTALOUPE 12'S
RANCHO DOS PALMAS LABEL 504 CANTALOUPE 15'S
RANCHO DOS PALMAS LABEL PLEASE REMIT ALL
MONIES AND INVOICES TO M & M PRODUCE BROKERAGE COMPANY P.O. BOX 1844 SALINAS CA 93902

14. On July 9, 1984, respondent Angelo Di Giacomo accounted to respondent Montes for the two shipments of cantaloupes on a consignment basis, and remitted net proceeds from the sale of the two shipments of cantaloupes to such respondent.

15. The formal complaint was filed on December 15, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Complainant alleges that the two lots of cantaloupes were sold to respondent Angelo Di Giacomo at the prices represented to complainant by respondent Montes, and asserts that respondent Angelo Di Giacomo's failure to pay complainant directly for the cantaloupes is a breach of its contract for which reparation should be awarded to complainant. Complainant also asserts that, in the

alternative, if it is concluded that respondent Angelo Di Giacomo should not be held liable for the purchase price of the cantaloupes, respondent Montes should be held liable to complainant.

The facts as stated in the findings of fact are clear from the record in this case, and are supported by a preponderance of the evidence. The record discloses that complainant and respondent Angelo Di Giacomo did not deal directly with each other prior to the shipment and receipt of the last load of cantaloupes. Under these circumstances the apparently duplicitous dealings of respondent Montes cannot be deemed to have resulted in a contract of sale between complainant and respondent Angelo Di Giacomo. There is clearly a lack of manifested mutual assent as to these parties. See *Anonymous*, 8 Agric. Dec. 374 (1949). At the most respondent Angelo Di Giacomo could only be held liable to complainant on an equitable basis for the fair market value of the produce which it received from complainant. However, this respondent would only be liable to complainant on such basis if it were possessed of adequate knowledge of complainant's interest in the two shipments of cantaloupe. Normally receipt of the two invoices from complainant would have been sufficient to put respondent Angelo Di Giacomo on notice of complainant's interest in the cantaloupes. See *J. Manning & Co. v. Bass & Swaggerty*, 34 Agric. Dec. 1036 (1975). However, in this case respondent Angelo Di Giacomo's letter of June 20, 1984 (see Finding of Fact 10) received no response from complainant. In addition the new invoices sent by complainant, following respondent Angelo Di Giacomo's posting of the June 20, 1984, letter, differed from the preceding invoices, not only in specifying a price adjustment, but also by placing the name and address of respondent Montes under the heading "billed" for the first time. The natural interpretation of this, in the context of the factual situation, was that respondent Montes was being billed for the cantaloupes. We find that respondent Angelo Di Giacomo is not liable to complainant for any amount.

Complainant's request that respondent Montes be held liable in the alternative that respondent Angelo Di Giacomo not be found liable is clearly meritorious. In its complaint complainant requested a total of \$8,995.20 from either respondent on the basis of the alleged price adjustment. In its opening statement complainant asserted that the award should be \$11,074.20, based upon the original contract price, since there was no evidence in the record that the cantaloupes in fact arrived in poor condition. A copy of the opening statement was served upon respondent Montes and it made no response thereto. Respondent Montes' willingness to confirm to complainant a sale at that price is deemed by us to be an admission

that the produce was at the time worth at least such amount Complainant's failure to realize that amount for the produce was directly attributable to the false statements made by Montes. We conclude that these false statements violated the Act (see 7 U.S.C. § 499b(4)) and damaged complainant in the amount of \$11,074.20. Under the circumstances of this case we find that complainant's request for an award of the original contract price is fully justified. Respondent Martino Montes d/b/a M & M Produce Brokerage's failure to pay complainant \$11,074.20 is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order respondent Martino Montes d/b/a M & M Produce Brokerage shall pay to complainant, as reparation, \$11,074.20, with interest thereon at the rate of 13% per annum from July 1, 1984, until paid.

The complaint against Angelo Di Giacomo is dismissed.

Copies of this order shall be served upon the parties.

GRASSO FOODS, INC. v. THE QUAKER OATS COMPANY. PACA Docket No. 2-6869. Decided October 3, 1986.

Acceptance—Breach by seller—Damages, Proof of.

Where buyer accepts nonconforming goods but fails to prove damage, it is liable for full contract price

Edward M. Silverstein, Presiding Officer

Pro se, for complainant.

Richard L. Frank, Washington, D.C., for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$13,200.00 in connection with the shipment of a truckload of frozen diced green pepper.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon the respondent, which filed an answer thereto denying

liability to complainant. In addition, respondent filed a counterclaim against complainant in the amount of \$5,210.05 in connection with the same shipment.

Since neither the amount of the formal complaint nor the amount of the counterclaim exceed \$15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence in this case, as is the department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant submitted a sworn opening statement, respondent filed a sworn answering statement, and complainant filed a sworn statement in reply. In addition, respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Grasso Foods, Inc., is a corporation whose mailing address is Route 2, Box 11, Swedesboro, New Jersey 08085.

2. Respondent, The Quaker Oats Company, is a corporation whose mailing address is 100 Lee Street, Jackson, Tennessee 38301.

3. At all material times, both complainant and respondent were licensed under the Act or operating subject to license under the Act.

4. In making purchases of frozen diced green peppers, the respondent requires that clumps in the green peppers not exceed 10% by weight of the total shipment.

5. During the 1983 shipping season, respondent purchased approximately 120,000 pounds of frozen diced green peppers from complainant through Jewell-Barksdale Associates, 5440 West Saint Charles Road, Berkeley, Illinois 60163. Of that 120,000 pounds, 80,000 pounds were initially rejected by respondent because the green peppers were frozen in clumps rather than free flowing as required by the contract's specifications. Jewell-Barksdale Associates, therefore, arranged for a local warehouse to recondition the peppers at complainant's expense, and respondent agreed to accept them.

6. During the 1984 shipping season, respondent agreed with Jewell-Barksdale Associates to accept further shipments of frozen diced green peppers from complainant. However, respondent clearly specified that it would not accept any shipment of green peppers which did not comply with their requirement that the peppers not be clump frozen. This information was conveyed to complainant by Jewell-Barksdale Associates, and complainant assured respondent through them that the flowing problem would be resolved.

7. On or about November 8, 1984, the respondent, through Jewell-Barksdale Associates, purchased 40,000 pounds of frozen green peppers from the complainant at a price of 33¢ per pound. The green peppers were required to meet respondent's specification no. 57903 which required that the green peppers not be frozen in clumps, but rather that they be free flowing. A confirmation of sale was issued by Jewell-Barksdale Associates on that same date. The green peppers were received by the respondent on or about November 19, 1984. On that same date, the respondent inspected the shipment of green peppers after it was unloaded from the truck, and discovered that the green peppers were clump frozen. In fact, some of the cartons were found to contain one single clump of green peppers. Since the shipment did not conform to its standards, the respondent attempted to reject the load by notifying Jewell-Barksdale Associates of the fact. Jewell-Barksdale Associates related this notice of rejection to the complainant. However, the complainant refused to accept the rejection. Moreover, when respondent attempted to redeliver the load to the complainant, complainant refused to accept them.

8. Of the 1,000 cases of green peppers which complainant delivered to respondent, the respondent found that 13 satisfied its quality standards and used them. The remaining 987 cases are being stored by the respondent.

9. A formal complaint was filed on March 13, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

It is clear that the complainant shipped a load of frozen diced green peppers to the respondent which did not conform to the parties' contractual agreement. That is, the parties' contract required that the green peppers be frozen in such a way as to allow them to be free flowing, however, the green peppers which the complainant delivered to the respondent were frozen in clumps. The shipment, therefore, did not conform to the parties' contractual agreement. Complainant did not dispute the fact. However, before respondent attempted to reject the load of green peppers, the 1,000 cartons were unloaded from the truck and taken into respondent's business location. Under the regulations, 7 CFR § 46.2(bb)(4), any rejection following an act of acceptance such as unloading is defined as a rejection "without reasonable cause." By unloading the cartons of green peppers, the respondent accepted them. *Julius Peller v. Bonnie Lee Super Food Mart*, 16 Agric. Dec. 1018 (1957). Having accepted the green peppers, respondent became liable to complainant for the full contract price less any provable damages. *Rocky Ford*

Dist. Co. v. Angel Produce, 29 Agric. Dec. 93 (1970). The respondent has the burden of proof as to such matters. *The Growers-Shipper Pot. Co. v. South W. Pro. Co.*, 28 Agric. Dec. 571 (1969).

As noted above, we are satisfied that the respondent has proven that the vast majority of the green peppers delivered by complainant did not satisfy the parties' contractual requirements. However, the respondent has failed to prove that it was damaged thereby. Respondent, in its counterclaim, seeks reimbursement of expenses it allegedly incurred with respect to the subject shipment, to wit: \$2,578.89 for freight charges incurred in its attempt to return the peppers to complainant; \$2,037.70 for storage charges it allegedly incurred as a result of its storage of the 987 cartons of peppers it has not used; and \$599.46 for labor charges it allegedly incurred "to inspect the peppers." Its claim for reimbursement for shipping charges is unwarranted inasmuch as it had no right to ship the green peppers back to the complainant after it accepted them. Moreover, as it accepted the peppers, the storage charge for which it claims reimbursement, as well as its claim for reimbursement for inspection cost, are costs of its own business operations. Such expenses are not reimbursable.

The only way in which the respondent could have proven damages was by a showing that the green peppers delivered had less value than the agreed contract price. One way of its doing so would have been for it to make a prompt and proper resale of them, or at least a valid attempt to do so. Since respondent did not do so, and did not offer any other proof showing that the peppers it accepted had less value than the price it had agreed to pay for them, it has failed to prove it was damaged. See *Dilatash v. Sacks Bros.*, 20 Agric. Dec. 626 (1961).

Accordingly, we must hold that the respondent is obligated to the complainant in the amount of \$13,200.00 and that the respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded. Moreover, in view of this, respondent's counterclaim should be dismissed.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$13,200.00 plus interest at the rate of 13% per month from December 1, 1984, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

SUNFRESH DISTRIBUTING COMPANY *v.* SOL SALINS, INC. PACA Docket
No. 2-6891. Decided October 3, 1986.

Evidence—Burden of proof.

Complainant alleged that it sold a truck load of grapes to respondent. Respondent claimed that the grapes were purchased from a third party. It was held that complainant failed to meet its burden of proving by a preponderance of the evidence that it sold the grapes to respondent and the complaint was dismissed.

George S. Whitten, Presiding Officer.

Gregory C. Horn, Beverly Hills, California, for complainant.

Howard B. Silberberg, McLean, Virginia, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$14,175.00 in connection with the shipment in interstate commerce of a truckload of grapes.

A copy of the report of investigation and of a supplemental report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, complainant filed a sworn opening statement, and pursuant to section 47.16 of the Rules of Practice respondent requested and was allowed to take the oral depositions of Paul Shipton, president of complainant, and Don E. Collier, employee of complainant at the time of the subject transaction. The depositions were taken with counsel for both parties present, and were subsequently received with evidence. Respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Sunfresh Distributing Company, is a corporation whose address is 6340 Green Valley Circle, 3-314, Culver City, California.

2. Respondent, Sol Salins, Inc., is a corporation whose address is 1325 Fifth Street, N.E., Washington, D. C. At the time of the transaction involved herein respondent was licensed under the Act.

3. On July 17, 1984, a truckload consisting of 1620 lugs of Thompson seedless grapes, "OH YES" brand, was shipped from Higley Citrus Packers, Higley, Arizona to Sol Salins, Inc., in Washington, D. C.

4. After arrival at the place of business of Sol Salins, Inc., in Washington, D. C., the grapes were federally inspected on July 23, 1984, at 11:15 a.m. The federal inspection shows that the temperatures ranged from 34 to 37 degrees and stated the condition to be as follows:

Berries generally firm and generally firmly attached to capstems. Stems mostly green, many turning brown and pliable.

Average 3% shatter berries.

Average 5% damage by sunken areas at capstems. From 5 to 25% in one-half of samples, none in remainder, average 7% damage by weak discolored berries. Less ½ of 1% decay.

The inspection certificate went on to state under the heading "REMARKS" that: "Samples showing weak, discolored and sunken areas, generally found in approximately one-half of pallets, located near rear doors." In addition it was stated that the inspection was restricted to the upper two layers of the load.

5. Respondent received an invoice, number 1202, dated July 17, 1984, from Texas Produce, Dallas, Texas, covering 1620 lugs of grapes at \$4.50 per lug, for a total of \$7,290.00, less freight in the amount of \$3,600.00, for a net invoice amount of \$3,690.00. On August 1, 1984, respondent issued Texas Produce a check in the amount of \$3,690.00 in payment for invoice number 1202.

6. An informal complaint was filed on August 14, 1984, which was within nine months after the cause of action alleged herein accrued.

CONCLUSIONS

Complainant alleges in its formal complaint, which was signed and sworn to by Paul Shipton, president of complainant corporation, that complainant sold the truckload of grapes to respondent on July 17, 1984, for a total purchase price of \$14,175.00 f.o.b. Attached to the formal complaint is a copy of a bill of lading showing the shipper as Higley Citrus Packers of Higley, Arizona, dated July

SUNFRESH DISTRIBUTING COMPANY *v.* SOL SALINS, INC. PACA Docket
No. 2-6891. Decided October 3, 1986.

Evidence—Burden of proof.

Complainant alleged that it sold a truck load of grapes to respondent. Respondent claimed that the grapes were purchased from a third party. It was held that complainant failed to meet its burden of proving by a preponderance of the evidence that it sold the grapes to respondent and the complaint was dismissed.

George S. Whitten, Presiding Officer

Gregory C. Horn, Beverly Hills, California, for complainant.

Howard B. Silberberg, McLean, Virginia, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$14,175.00 in connection with the shipment in interstate commerce of a truckload of grapes.

A copy of the report of investigation and of a supplemental report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, complainant filed a sworn opening statement, and pursuant to section 47.16 of the Rules of Practice respondent requested and was allowed to take the oral depositions of Paul Shipton, president of complainant, and Don E. Collier, employee of complainant at the time of the subject transaction. The depositions were taken with counsel for both parties present, and were subsequently received with evidence. Respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Sunfresh Distributing Company, is a corporation whose address is 6340 Green Valley Circle, 3-314, Culver City, California.

2. Respondent, Sol Salins, Inc., is a corporation whose address is 1325 Fifth Street, N.E., Washington, D. C. At the time of the transaction involved herein respondent was licensed under the Act.

3. On July 17, 1984, a truckload consisting of 1620 lugs of Thompson seedless grapes, "OH YES" brand, was shipped from Higley Citrus Packers, Higley, Arizona to Sol Salins, Inc., in Washington, D. C.

4. After arrival at the place of business of Sol Salins, Inc., in Washington, D. C., the grapes were federally inspected on July 23, 1984, at 11:15 a.m. The federal inspection shows that the temperatures ranged from 34 to 37 degrees and stated the condition to be as follows:

 Berries generally firm and generally firmly attached to capstems. Stems mostly green, many turning brown and pliable.

 Average 3% shatter berries.

 Average 5% damage by sunken areas at capstems. From 5 to 25% in one-half of samples, none in remainder, average 7% damage by weak discolored berries. Less ½ of 1% decay.

The inspection certificate went on to state under the heading "REMARKS" that: "Samples showing weak, discolored and sunken areas, generally found in approximately one-half of pallets, located near rear doors." In addition it was stated that the inspection was restricted to the upper two layers of the load.

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6. An informal complaint was filed on August 14, 1984, which was within nine months after the cause of action alleged herein accrued.

CONCLUSIONS

Complainant alleges in its formal complaint, which was signed and sworn to by Paul Shipton, president of complainant corporation, that complainant sold the truckload of grapes to respondent on July 17, 1984, for a total purchase price of \$14,175.00 f.o.b. Attached to the formal complaint is a copy of a bill of lading showing the shipper as Higley Citrus Packers of Higley, Arizona, dated July

17, 1984, and covering 1620 lugs of Thompson Seedless grapes, "OH YES" brand. The bill of lading shows that the grapes were loaded and shipped on July 17, 1984. The consignee is shown as Sunfresh Dist. Co., 6340 Green Valley #314, Culver City, Calif. 90230. Under the printed heading "Drop-off instructions" is typed the following: "Salinas, Sol Inc., 1325 5th St. N. E., Washington, D. C. 20002." Both parties admit that this bill of lading is applicable to the subject load of grapes. Complainant's Paul Shipton further alleged in the sworn opening statement that after the grapes were received he received a telephone call from the truck broker stating that there was a problem with the load in Washington, D. C. Mr. Shipton states that he then called respondent, inquired as to the cause of the problem, and was told that the grapes were in poor condition. Mr. Shipton states that he instructed the person on the telephone from respondent to have a federal inspection made, and have the inspector call Mr. Shipton upon conclusion of the inspection. Mr. Shipton further states that approximately two hours passed, and not having heard from the inspector, he called respondent, and was told that the inspection was in progress. Mr. Shipton alleges that he kept a Mr. Lucero of "Higley Citrus Packers" informed as to what was progressing. Mr. Shipton states in addition that after another hour passed he again called respondent to inquire about the results of the inspection, and was told that the inspector had left, but was read the supposed results of the inspection by a representative of respondent. Mr. Shipton asserts that what was read to him over the telephone indicated that that grapes were in very poor condition, and that on the basis of such condition, after contacting Mr. Lucero, he agreed to the grapes being sold by respondent for trucking charges. Mr. Shipton states that he later called the U.S. Department of Agriculture in Washington and determined that the inspection did not show that the grapes were as bad as they had been represented to be by the representative of respondent. Complainant contends, in effect, that the agreement that the grapes could be sold for trucking charges by respondent should be voided, and complainant should be awarded the alleged original contract price of \$14,175.00. See *Harte McCabe v. Higgins Potato Co.*, 17 Agric. Dec. 1025 (1958).

Respondent's reply to complainant's allegations was made by Richard Salins, secretary of respondent firm, and contained in respondent's answer. There is no showing as to what part or parts of respondent's answer Mr. Salins had personal knowledge. However, Mr. Salins alleges in the answer, on behalf of respondent, that no sale of grapes from complainant to respondent ever took place, and that the grapes which respondent received were purchased from

Texas Produce of Dallas, Texas. Mr. Salins further stated that respondent paid Texas Produce for the grapes. The Department's report of investigation contains, in addition to the documentation already mentioned, a copy of an invoice from Higley Citrus Packers to Sunfresh Distributing Company for a truckload of 1620 lugs of Thompson grapes, "OH YES" brand, at \$8.75 per lug or \$14,175.00. In addition the invoice states a charge of \$22.50 for a Ryan temperature recorder. The invoice shows that the shipment was to be made to "Salins, Sol Inc.", at the address of Sol Salins, Inc., in Washington, D. C., and references "purchase order number 2558". The report of investigation also contains a copy of a Western Union mailgram dated July 24, 1984, from Higley Citrus Packers to Sunfresh Distributors which states as follows:

ATTN DON COLLIER,

IN REFERENCE TO OUR CONVERSATION THIS MORNING, I AM AUTHORIZING YOU TO HANDLE THE LOAD 302558 TO BE HANDLED FOR OUR ACCOUNT.

The supplemental report of investigation contains an unverified letter from Herman Lucero of Higley Citrus Packers to the Fruit and Vegetable Division of this Department which states in relevant part as follows:

Gentlemen:

On July 17, 1984 we sold to Sun Fresh Dist. Co., 1620 lugs of Thompson Seedless Grapes which carried the brand of OH YES. We have never heard of or sold anything to Texas Produce Co.

Complainant had the burden of proving by a preponderance of the evidence that it sold the truckload of grapes to respondent. See *Best Pak Potato Co., Inc. v. Louis M. Palomo Wholesale Produce*, 32 Agric. Dec. 675 (1973). Complainant did not send an invoice to respondent at the time the contract was entered into nor at any time thereafter. Complainant's Paul Shipton was asked a question during the oral deposition concerning complainant's practice in documenting a sale:

Q. IN JULY OF 1984, WHEN SUNFRESH WOULD ENTER INTO A TRANSACTION INVOLVING THE SALE OF PRODUCE TO SOME OTHER CONCERN, HOW DID SUNFRESH RECORD A SALE TRANSACTION?

A. WELL, WHEN WE PURCHASE THE MERCHANDISE, WE MAKE UP A PURCHASE ORDER. AND FROM THE PURCHASE ORDER WE, THE SAME DAY THE PURCHASE ORDER IS DRAWN—EXCUSE ME, WHEN THE MERCHANDISE IS SHIPPED, THE SAME DAY WE INVOICE THE CUSTOMER.

OR WE WAIT UNTIL THE MERCHANDISE ARRIVES AND MAKE SURE EVERYTHING IS OKAY AND THEN WE INVOICE THE CUSTOMER. WE HAD TWO DIFFERENT WAYS.

We think it is significant that neither of the ways described by complainant's president were followed in this case. However, complainant's position in this proceeding suffers from even more serious difficulties. Paul Shipton testified during the course of the oral deposition that he had absolutely nothing to do with the contracting of the sale of the subject grapes:

Q. AND AS PRESIDENT, WHAT WERE YOUR DAILY OBLIGATIONS AND DUTIES WITH SUNFRESH?

A. MY DUTIES BEING—BASICALLY I WAS SELLING ONIONS, AND DON WOULD BE SELLING THE WET.

* * * * *

Q. WHAT AUTHORITY DID MR. COLLIER HAVE TO BUY AND SELL ON BEHALF OF SUNFRESH IN JULY OF 1984?

A. HE HAD FULL AUTHORITY TO BUY AND SELL, PURCHASE PRODUCE AND SELL IT.

Q. AT WHAT TIME IN JULY OF 1984, DID YOU REQUIRE HIM TO CONSULT WITH YOU BEFORE HE WOULD SET A CERTAIN PRICE ON A PARTICULAR LOT OF PRODUCE OR BUY ONLY AT A CERTAIN PRICE?

A. NO RESTRICTIONS.

Q. SO HE HAD CARTE BLANCHE THEN,——

A. YES.

Q. —TO BUY AND SELL FOR SUNFRESH?

A. YES.

* * * * *

Q. WHEN YOU PURCHASED THESE GRAPES FROM HIGLEY IN JULY OF 1984, DID YOU TELL MR. COLLIER TO GO OUT AND TRY TO SELL THEM FOR SUNFRESH?

Mr. HORN: OBJECTION; HE SAID THAT MR. COLLIER PURCHASED THEM. HE DIDN'T SAY THAT HE PURCHASED THEM.

The WITNESS: AND HE SAID "YOU." YOU HAD TO MEAN SUNFRESH.

BY Mr. SILVERBERG:

Q. SUNFRESH, YES.

A. DON COLLIER HANDLED THE WHOLE TRANSACTION.

Q. SO YOU HAD NO FORE KNOWLEDGE OF IT WHATSOEVER?

A. NO. . . .

* * * * *

Q. TO YOUR KNOWLEDGE, DID SUNFRESH BECOME INVOLVED AT ALL IN ARRANGING THE TRANSPORTATION OF THE GRAPES TO SALINS?

A. DON COLLIER AGAIN. DON HANDLED THE TRANSACTION.

Mr. Shipton made his noninvolvement in the transaction even clearer when he was questioned by respondent's attorney concerning the sworn opening statement which he submitted. Such statement had been written in the first person, recounted all of the alleged events relative to the transaction, and was signed by Mr. Shipton. The statement begins as follows:

I, PAUL SHIPTON, declare:

I am President of SUNFRESH DISTRIBUTING COMPANY, a California corporation, and the Complainant in the above-entitled action. I am aware of the facts recited in this affidavit through my own personal knowledge, and

if I were to be called as a witness, I could competently testify thereto.

However, respondent's attorney went over each paragraph of the opening statement with Mr. Shipton during the oral deposition testimony, and Mr. Shipton affirmed repeatedly that he had no personal knowledge of the events related in the opening statement until the last paragraph on page 3 where it is alleged that he called the United States Department of Agriculture in Washington and requested a reading of the inspection and that a copy be sent to him.

When we turn to the deposition testimony of Don Collier we are confronted with what amounts to a professed vast ignorance concerning the transaction in question, covered over by an occasional vague recollection. To summarize Mr. Collier's testimony, he admits to being personally involved in the grape transaction, and admits knowing that in July of 1984, grapes were shipped from Arizona to Washington, D. C. However, he doesn't recall by whom and when he was first advised that grapes were available for sale, nor how he first became involved. He did not know whether complainant was a shipper or seller or was acting as a broker. He did not remember whether he personally contacted Salins to see if it wished to purchase grapes, and did not remember whether he entered, or claimed on behalf of Sunfresh to have entered, into a "sale purchase" of the grapes. He did not recall what first got him involved in the grape transaction. He recalled communications that he made to Salins, but did not recall what the communications were or when they occurred. He vaguely recalled that Higley Produce was the grape supplier, and was sure that he talked to Higley about supplying the grapes, but did not remember who he talked to. He recalled problems with the grapes, and discussing the problems with Shipton, and requesting that someone at Salins get a federal inspection of the grapes. However, he did not remember being advised as to the results of the inspection by anyone at Salins, but later vaguely remembered so being advised. He was unable to answer whether he made any kind of memoranda of telephone conversations and discussions during the course of his involvement in the transaction, but later was sure that he did make notes, but could not remember what happened to them. He did not know what complainant's practice and procedure was in July of 1984, as to how it documented its sales of produce. Mr. Collier was confronted by respondent's counsel with the contrast between his memory at the time of the oral deposition, and his prior written statement which had been submitted as a part of the record in the

proceeding. Interestingly the written statement parallels closely in the opening statement sworn to by Paul Shipton. Mr. Collier's testimony was as follows:

Q. THERE CAME A TIME, MR. COLLIER, WHEN YOU HAD OCCASION TO MAKE A WRITTEN STATEMENT UNDER OATH AS TO THIS PARTICULAR TRANSACTION. DO YOU RECALL THAT, SIR?

A. YES, SIR, I DO.

Q. DO YOU RECALL THE CIRCUMSTANCES UNDER WHICH THAT DOCUMENT WAS PREPARED?

A. I.E. UNDER DURESS?

Q. NO. DID SOMEBODY REQUEST THAT YOU PUT IN WRITING YOUR KNOWLEDGE?

A. YES. PAUL SHIPTON.

We freely confess that we do not know who sold the subject grapes to Sol Salins, Inc. Certainly it would seem that respondent should have been able to present far more thorough and convincing evidence concerning the alleged sale of the grapes to respondent by Texas Produce. In addition, we note that Mr. Collier did testify that he didn't believe he had ever heard of a firm called Texas Produce. But then, given a memory like Mr. Collier's, one can easily imagine him having sold the grapes to Texas Produce, and subsequently being unable to recall anything concerning the sale. The resolution of this case lies, not in determining whether Texas Produce sold the grapes to Sol Salins, Inc., but whether complainant has met its burden of proving by a preponderance of the evidence that it sold the grapes to Sol Salins, Inc. We conclude that complainant has not met this burden, and that the complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

BLISS PRODUCE COMPANY *v.* AGNES M. FROST and EUGENE A. FROST
d/b/a FROST TRUCKING. PACA Docket No. 2-6931. Decided Oc-
tober 3, 1986.

**Failure to communicate clear rejection constitutes acceptance—Purchaser who ac-
cepts produce has burden of proving breach of contract.**

Respondent failed to provide any documentation or other credible evidence to prove
a breach of contract in connection with its purchase of a truckload of potatoes.

Jory M. Hochberg, Presiding Officer.

Robert D. Bliss, Greeley, Colorado, for complainant

David G. Stronge, Bakersfield, California, for respondent

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), hereinafter, "the Act." A timely complaint was filed in which complainant seeks an award of reparation against respondent in the total amount of \$3,150.80, in connection with the sale of a truckload of potatoes in interstate commerce. A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent. Respondent filed an Answer and Counterclaim on July 11, 1984, alleging that it was damaged by the complainant in the amount of \$1,150.00. A Reply was thereafter filed by complainant on August 13, 1985.

Since the amount claimed as damages does not exceed \$15,000, the shortened method of procedure set forth in the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence herein, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of additional sworn statements. No further statements were filed by the parties. Complainant filed a brief while respondent chose not to do so.

FINDINGS OF FACT

1. Bliss Produce Company is a corporation whose business mailing address is P.O. Box 816, Greeley, Colorado 80632.

2. Frost Trucking is a partnership composed of Agnes M. Frost and Eugene A. Frost whose business address is Box 272X, Bakersfield, California 93307. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about December 12, 1983, by oral agreement, complainant sold to respondent one truckload of Bulk oversize Kennebec potatoes at the agreed price of \$9.00 per cwt., delivered to Venice, California, payment due within thirty days of delivery.

4. Pursuant to this contract, on December 12, 1983, complainant shipped 46,120 pounds of Bulk oversize Kennebec potatoes from Grafton, North Dakota to respondent. This truckload was delivered to respondent at Venice, California on December 15, 1983.

5. Immediately after delivery, respondent was billed \$4,150.80 in accordance with the contract terms. During each of the next seven months, complainant sent bills to respondent requesting the remittance of \$4,150.80 and stating that the payment was long overdue. In August, 1984, complainant's billing also threatened collection action, and immediately thereafter, respondent sent a payment of \$1,000.00 to complainant. Complainant mailed four additional bills to respondent during the next four months requesting payment of the balance of \$3,150.80.

6. An informal complaint in this proceeding was filed on September 28, 1984, which was within the nine months after the cause of action accrued. The formal complaint was then filed on March 26, 1985.

CONCLUSIONS

The record in this proceeding clearly supports an order requiring respondent to pay complainant the balance of the amount billed on the potatoes which were delivered to respondent. The following evidence is undisputed. The truckload in question was accepted at the destination and the bill of lading was signed without any mention of a product problem. For seven months following the transaction in question, complainant billed the respondent for a "Long Overdue" obligation on this contract. On its next billing, in August, 1984, complainant referred to a telephone conversation in which respondent agreed to send a check for the invoiced amount. Complainant also threatened legal action on that bill unless the check was sent immediately. Approximately one week later, complainant received a check for \$1,000.00 from respondent.

In September, 1984, complainant's monthly billing contained the following statement:

Thanks for your check in the amount of \$1,000.00, leaving a balance due of \$3,150.80. Please send check to Bliss Produce Co. P.O. Box 816, Greenley, Co. 80612.

If we do not hear from you, we will have to turn this over for collection. As per my telephone conversation with Mrs.

Frost 9/6/84, she said you would be in this weekend.
PLEASE SEND CHECK.

In October, 1984, complainant's billing stated the following:

Dear Mr. Frost:

As per our telephone conversation 10/9/84 P.M. You said you would follow up on this account.

Please send your check in the amount of \$3,150.80.

Respondent now claims that the potatoes were frozen when delivered and that upon informing complainant of this problem shortly after delivery, complainant agreed to investigate the matter and communicate back. Respondent makes no attempt to explain why it never responded formally to the many bills which complainant sent to it and which reference telephone conversations during which respondent purportedly agreed to pay the entire invoiced amount. Respondent further claims that it only paid the \$1,000.00 because it badly needed additional product from complainant.

It is immediately apparent from the record that despite the numerous bills sent by complainant it was not until November 1, 1984, that respondent bothered to document in writing its allegation that the potatoes were frozen and useless. This was done in response to an inquiry from the regional office of the Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture (this was the second inquiry sent to respondent, the first one having been unanswered). In fact, respondent's claim at that time—that the potatoes were hauled to a hog farm—is contradicted by the claim in its Answer that the potatoes were hauled to a dairy in Corona, California and dumped for cattle feed. Moreover, respondent's contention in its Answer that the potatoes were hauled to the Venice dairy by Espinoza Trucking is also contradicted by a December, 1984, letter written by Eugene Frost to the Fruit and Vegetable Division in which he claims the potatoes were hauled to a Corona hog farm by Western Pacific Carriers.

Respondent has not only failed to provide adequate explanations concerning the statements and documentation provided by complainant, but has, in fact, provided further support to complainant's claims as a result of its contradictory contentions. The evidence clearly supports a conclusion that respondent accepted the potatoes delivered pursuant to the contract. Having accepted the shipment it is respondent's burden to prove a breach of the contract. *Neal v. Kanakry*, 20 Agric. Dec. 771 (1961). There is no credi-

ble evidence in the record to establish that the condition of the potatoes upon delivery was not in accordance with the contract.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$3,150.80 with interest thereon at the rate of 13% per annum from March 1, 1984, until paid.

The counterclaim of the respondent is dismissed.

Copies of this order shall be served upon the parties.

FLOYD J. BEYER, v. S. B. DAVIS COMPANY. PACA Docket No. 2-7016.
Decided October 3, 1986.

Burden of Proof.

Complainant failed to sustain its burden of proving that the respondent broker violated its broker's duties. The complaint was therefore dismissed.

Andrew Stanton, Presiding Officer.

Pro se, for complainant.

Pro se, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$1,791.00 in connection with the sale of a quantity of potatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as is the verified complaint. The answer, since it is not verified, is not considered part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement, respondent submitted an answering statement, and com-

plainant submitted a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Floyd J. Beyer, is an individual whose address is 233 South Knight Road, Munger, Michigan.

2. Respondent, S. B. Davis Company, is a corporation whose address is 2695 Elmridge Drive N.W., Grand Rapids, Michigan. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately May 7, 1984, respondent, through its vice-president Charles Johnson, acting as a broker on behalf of Nash-DeCamp Company, Visalia, California (hereinafter "Nash-DeCamp"), the agent of the shipper, Kundert Bros., Edison, California, negotiated the sale of a carload of Kundert potatoes from Nash-DeCamp to complainant. The carload consisted of 700 sacks of size A potatoes at \$10.00 per sack, and 300 sacks of size B potatoes at \$5.00 per sack, plus \$22.50 for a temperature recorder, for a total contract price of \$8,522.50, f.o.b. Mr. Johnson did not inform complainant, at the time the contract was negotiated, that the \$10.00 per sack price for the size A potatoes was a "lid" price, and that complainant would be protected in the event of market decline. The potatoes were delivered to complainant on approximately May 16, 1984.

4. Respondent prepared a confirmation of sale reflecting the contract terms agreed to between the parties, as set forth in Finding of Fact 3, and sent it to complainant and Nash-DeCamp. Complainant never objected to the confirmation of sale.

5. On approximately May 16, 1984, complainant, respondent and Nash-DeCamp agreed to a \$1.00 per sack reduction in price of the size A potatoes to \$9.00 per sack. Respondent prepared an invoice reflecting the adjusted price of \$9.00 per sack and sent it to complainant. Complainant never objected to the invoice until it returned it to respondent on June 15, 1984, with the price altered to \$8.00 per sack for the size A potatoes, reflecting a \$2.00 per sack reduction.

6. An informal complaint was filed on November 30, 1984, which was within nine months when the alleged cause of action herein accrued. A formal complaint was filed on September 27, 1985.

CONCLUSIONS

Complainant claims that respondent, through its vice-president, Charles Johnson, violated its duty as a broker in connection with the sale of carload of potatoes to complainant from Nash-DeCamp

Company, Visalia, California. Complainant alleges that at the time the contract was negotiated, Mr. Johnson told him that Mazzei-Franconi potatoes would be shipped, but without permission substituted Kundert potatoes. Complainant also contends that Mr. Johnson agreed that the price for the 700 sacks of size A white potatoes would have a \$10.00 per sack lid, with the final price to be determined at the time of delivery. Complainant contends further that when the potatoes were delivered, on approximately May 16, 1984, Mr. Johnson adjusted the price on the size A potatoes to \$8.00 per sack, a \$2.00 reduction. However, complainant asserts that Mr. Johnson acted without authorization from Nash-DeCamp, which did not honor the \$2.00 per sack adjustment, permitting only a \$1.00 per sack reduction. When complainant refused to pay the difference of \$700.00, Nash-DeCamp brought a reparation complainant against him and, on April 22, 1985, was awarded \$700.00, plus \$91.00 interest (*Nash-DeCamp Company v. Floyd J. Beyer* 44 Agric. Dec. ____ (1985)). Complainant claims this sum plus \$1,000.00 as his damages resulting from complainant's breach of its broker's duties.

The duties of a broker are set forth in section 46.28 of the regulations (7 CFR 46.28) in part, as follows:

(a) General. The function of a broker is to negotiate, for or on behalf of others, valid and binding contracts. A broker who fails to perform any specification or duty, express or implied, in connection with any transaction is in violation of the act and is subject to the penalties specified in the act and may be held liable for damages which accrue as a result thereof. It shall be the duty of the broker to fully inform the parties concerning all of the terms and conditions of the proposed contract. . . . The broker should advise his principal promptly of rejection by the buyer or of any other unforeseen development of which he is informed.

Complainant, as the moving party, has the burden of proving by a preponderance of the evidence the essential allegations of his complaint (*Vernon C. Justice v. Milford Packing Co., Inc. and/or Leibowitz Pickle Products, Inc.*, 34 Agric. Dec. 533 (1975)), including in this case that respondent violated its broker's duties. After carefully examining all the evidence in the record, we can perceive no such violation by respondent. Respondent's Charles Johnson, in a sworn statement submitted as respondent's answering statement, has denied complainant's allegations that at the time the contract was being negotiated, Mr. Johnson informed him that Mazzei-Franconi potatoes would be shipped, and that the size A white potatoes

would have a \$10.00 per sack lid price, with the final price to be designated at the time of delivery. The most accurate indication of the contract terms negotiated by respondent can be found in respondent's confirmation of sale, to which complainant never objected. That document completely supports respondent, as it shows the shipper as Kundert Bros. and a price of \$10.00 per sack for the size A potatoes. The confirmation does not mention Mazzei-Franconi potatoes, nor does it say that the \$10.00 per sack price is merely a lid, with the final price to be determined after delivery. Complainant's claim that Mr. Johnson gave him a \$2.00 per sack price reduction on the size A potatoes, although the seller, Nash-DeCamp, had only authorized a \$1.00 per sack reduction, is also denied by Mr. Johnson in his sworn answering statement. The only other evidence of any price adjustment negotiated by respondent is respondent's May 16, 1984, invoice to complainant, issued on the seller's behalf, which shows a \$9.00 per sack price for the size A potatoes. This fully supports respondent's position. Mr. Johnson asserts that complainant received the invoice but never objected to it until this invoice was returned to respondent on June 15, 1984, altered to show a price of \$8.00 per sack for the size A potatoes. Complainant has not disputed this assertion. Based on all the evidence in the record, we can not conclude that complainant has sustained his burden of proving that respondent violated any of its duties as a broker regarding the original contract negotiations or the change in price terms for the size A potatoes. Therefore, there is no merit to the complaint and it must be dismissed.

ORDER

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

FRUIT MARKETING, INC., *v.* PURITY SUPREME, INC. PACA Docket No. 2-6951. Decided October 6, 1986.

Acceptance by unloading—Rejection ineffective if after acceptance—Burden of proving breach of warranty and damages on respondent buyer—Determination of damages resulting from breach of warranty.

Since respondent accepted the plums by unloading them from the truck, its subsequent attempted rejection was ineffective. Respondent proved that there was a breach of complainant's suitable shipping condition warranty and that transportation conditions were normal. Respondent also proved damages. Complainant awarded the difference between the contract price and respondent's damages.

Andrew Stanton, Presiding Officer

Pro se, for complainant.

Pro se, for respondent

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$1,802.50 in connection with a quantity of plums sold and shipped to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Respondent submitted an answering statement, and complainant submitted a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Fruit Marketing, Inc., is a corporation whose address is P.O. Box 399, Del Rey, California.

2. Respondent, Purity Supreme, Inc., is a corporation whose address is 312 Boston Road, North Billerica, Massachusetts. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately June 28, 1984, complainant sold to respondent 240 lugs of Honey Gold plums at prices of \$4.00 per lug for 42 lugs of 4×5 plums, \$4.00 per lug for 35 lugs of 3×4×5 plums, and \$8.00 per lug for 163 lugs of 4×4 plums, plus \$22.50 for a Stires recorder and \$168.00 for precooling and palletizing, for a total contract price of \$1,802.50, f.o.b.

4. The load of plums was shipped in interstate commerce to respondent's place of business, where it arrived on July 3, 1984, and was unloaded.

5. On July 3, 1984, after arrival of the plums, respondent had them federally inspected, which resulted as follows, in relevant part:

WHERE INSPECTED	Appl Warehouse
.	
Condition Of Load.	Stacked on pallets at above location.
.	
Temperature of Product:	37 to 42°F
Condition:	Generally hard to firm, ground color light green to greenish-yellow. Average 6% damage by bruising. Range 8 to 22%, average 15% damage by brown surface discoloration affecting $\frac{1}{4}$ to $\frac{3}{4}$ of surface. Decay ranges 2 to 8%, in most samples, some none, average 5% Brown Rot in various stages.
. . .	
Remarks:	Applicant states above shipment unloaded from trailer number Florida 45870.

6. Sometime after the inspection, respondent informed the broker that it was rejecting the load. Complainant refused to authorize respondent to sell the plums for its account. On July 5, 1984, respondent turned the plums over to Peter Condakes Company, Inc., Everett, Massachusetts (hereinafter, "Condakes"), for consignment handling. Condakes provided an account of sales showing that it had received gross proceeds of \$967.00 and deducted \$145.05 for commission and \$36.00 for handling, resulting in net proceeds of \$785.95.

8. Respondent has not paid anything to complainant for the load of plums at issue.

9. An informal complaint was filed on March 6, 1985, which was within nine months from when the cause of action herein accrued. A formal complaint was subsequently filed on June 28, 1984.

CONCLUSIONS

Respondent alleges that it rejected the plums because of their poor condition. However, according to the July 3, 1984, inspection report, the plums were inspected while stored in respondent's warehouse, after they had been unloaded from the truck. Respondent's action of unloading the plums was an exercise of dominion that constituted acceptance. *Stonoca Farms Corporation v. S & S Produce Inc.*, 42 Agric. Dec. 937 (1983). Respondent does not state when it tried to reject the plums, but we can assume that it did so after the plums were unloaded and inspected. Respondent's attempted rejection of the plums therefore came after acceptance and was ineffective. *Herbert Rich Co. v. Blue Bonnet Foods, Inc.*, 38 Agric. Dec. 480 (1979).

Respondent is liable for the contract price of the accepted plums, less damages resulting from any breach of warranty. It is respondent's burden to prove the breach and damages by a preponderance of the evidence. *Stonoca Farms Corporation v. S & S Produce Inc.*, *supra*. Since this was an f.o.b. sale, complainant gave the implied warranty of suitable shipping condition, meaning that the plums, at the time of billing, will be in a condition which, if handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties. 7 CFR § 46.46(j). The July 3, 1984, inspection shows abnormal deterioration. Complainant claims that transportation conditions were abnormal, as indicated by the readings of the Stires recorder, which shows the temperature ranging from 45° to 50°F. for most of the trip. Respondent contends that the Stires recorder was not working properly, as it was found on the floor of the truck upon arrival at respondent's warehouse. Further, respondent points out that the pulp temperatures indicated by the inspection were from 37° to 42°F., which is inconsistent with a transit temperature as high as that reported by the Stires recorder. We agree with respondent that these two temperature readings are inconsistent, and conclude that the pulp temperatures found by the federal inspection are a more accurate indication of the normalcy of the transportation conditions than the reading of the Stires recorder. As such pulp temperatures are not excessive for plums, we find that transportation conditions were normal.

Complainant was thus in breach of its suitable shipping condition warranty. As damages resulting from its breach, respondent is entitled to the difference at the time and place of acceptance between the actual value of the plums and their value if they had been as warranted. *Tom Bengard Ranch, Inc. a/t/a Kleen Harvest v. Garden State Farms, Inc.*, 42 Agric. Dec. 922 (1983). The actual

value is usually determined by the results of a prompt and proper resale. The consignment handling by Peter Condakes Company, Inc., resulting in net proceeds of \$785.95, is not disputed by complainant and appears to be prompt and proper. For the value of the plums if they had been as warranted, we will take judicial notice of the price quotations of the Market News Service Reports for Everett, Massachusetts. Although the reports for early July 1984 do not make reference to Honey Gold plums, the price for such plums can be determined by averaging the prices quoted for the many different types of California Plums listed, utilizing the lower price where a range of prices is noted. The average price for 4×4 plums on July 3, 1984, is \$11.50 per lug. The average price for $3 \times 4 \times 5$ plums on July 3, 1984 is \$7.50 per lug. While prices for 4×5 plums are not listed under July 3, 1984, they are found in the reports of July 5, 1984, at \$6.00 per lug. Therefore, the price for the plums, if they had been as warranted, would have been \$1,874.50 for the 163 lugs of 4×4 plums, \$262.50 for the 35 lugs of $3 \times 4 \times 5$ plums, and \$252.00 for the 42 lugs of 4×5 plums, for a total of \$2,389.00. The difference between the actual value of \$785.95 and the value if the plums had been as warranted, \$2,389.00, is \$1,603.05. We should deduct from this figure the amount respondent saved by failing to pay for freight, which was respondent's obligation under the f.o.b. terms of the contract, since complainant presumably paid the freight after respondent's purported rejection. However, there is absolutely no evidence in the record as to what complainant paid for freight for the shipment to respondent, and we are thus forced to find respondent's damages to be \$1,603.05.

Respondent's liability is the contract price of \$1,802.50 less its damages of \$1,603.05, or \$199.45. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$199.45, with interest thereon at the rate of 13% per annum from August 1, 1984, until paid.

Copies of this order shall be served upon the parties.

BONITA PACKING CO., INC., v. LOOKOUT MOUNTAIN TOMATO & BANANA CO. INC. PACA Docket No. 2-6934. Decided October 17, 1986.

Broker sale—Failure to prove breach of contract—Complaint dismissed—Open Pricing.

Broker who negotiated sale confirmed respondent's contention that contract price for a truckload of tomatoes was not determined at the time of sale but rather left open to be determined on Tuesday of the week following shipment. Since respondent had paid complainant market price as of that date, complainant failed to prove contract breach, and complaint was dismissed.

Thomas C Heinz, Presiding Officer.

Billy Don Grant, Bonita Springs, Florida, for complainant.

Dale Schrenck, Chattanooga, Tennessee, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter "the Act". A timely complaint was filed in which complainant sought a reparation award against respondent in the amount of \$26,640.00 in connection with the sale and shipment of a truckload of tomatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon the parties. After a copy of the formal complaint was served upon respondent, respondent voluntarily paid complainant \$14,163.00, thereby reducing the amount in dispute to \$12,477.00. Thereafter, respondent filed an answer denying liability except as to \$6,877.00 of the \$12,477.00 claim. Respondent was accordingly ordered to pay \$6,877.00 to complainant, leaving \$5,600.00 as the final amount in dispute.

Since the amount claimed does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given opportunities to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement but no brief. Respondent submitted an answering statement which, although not timely filed, was accepted into the record inasmuch as the relevant and material content thereof merely duplicates evidence already in the record. Respondent also did not file a brief.

FINDINGS OF FACT

1. Complainant, Bonita Packing Co., Inc. (hereinafter "Bonita"), is a corporation with a mailing address at Post Office Box 309, Bonita Springs, Florida 33923.

2. Respondent, Lookout Mountain Tomato and Banana Company, Inc. (hereinafter "Lookout"), is a corporation with a mailing address at 1212 Peoples Street, Chattanooga, Tennessee 37403. At the time of the transaction involved herein, Lookout was licensed under the Act.

3. On or about January 23, 1985, Bonita in interstate commerce sold Lookout by oral contract a truckload of fresh tomatoes, consisting of 1600 boxes of 5×6 size tomatoes.

4. The contract was negotiated by Pat Adams of Bonita Springs, Florida, who acted as agent for both complainant and respondent.

5. Lookout accepted the tomatoes at destination and has paid Bonita \$21,040.00 of the \$26,640.00 demanded by Bonita as the purchase price.

6. A formal complaint was filed on March 25, 1985, which was within nine months from the time the cause of action accrued.

SUBSIDIARY FINDINGS AND CONCLUSIONS

Bonita claims the contract price for the tomatoes was \$16.00 per box plus \$.50 per box for degreening and \$.15 per box for palletizing. In support of that claim, Bonita submitted evidence showing the average Florida price for the week ending January 19, 1985, was \$17.09 per box, and for the week ending January 26, 1985, the average price was \$14.70 per box. Further, for tomatoes shipped between January 18, 1985, and January 25, 1985, Bonita generally charged customers other than Lookout \$16.00 per box, although some prices were as low as \$10.00 per box for the same size tomatoes. Lookout, on the other hand, contends that the price was not determined on January 23, the shipment date, but rather left open to be determined by the market price on Tuesday, January 29, 1985, pursuant to the past practice of Lookout and Bonita on tomato contracts where the price was settled on Tuesday of the week following shipment.

As the moving party, Bonita has the burden of proving by a preponderance of the evidence the terms of the contract, respondent's breach thereof, and the resulting damages, if any, sustained by Bonita. *Justice v. Milford Packing Co.*, 34 Agric. Dec. 533, and cases cited at 535 (1975). Bonita has not met that burden. Pat Adams, the broker who represented both Bonita and Lookout in this transaction, corroborated without qualification Lookout's contention that "this load should have been priced on Tuesday, January 29, 1985."

As an ostensibly neutral third party, the broker's statements are entitled to great weight. *Homestead Tomato Packing Co. v. Mims Produce, Inc.*, 43 Agric. Dec. ____ (1984). Therefore, we cannot credit Bonita's claims regarding the price term of the contract. Similarly, Bonita's claim for a degreening charge finds no support in the record. In fact, Bonita's own evidence shows that it did not charge the vast majority of its customers for degreening during the period in question (33 out of 43 sales or 77%). In sum, Bonita has not proved its allegations by a preponderance of the evidence.

The market price for the tomatoes was \$13.00 per box on Tuesday, January 29, having dropped significantly from the previous week's abnormally high prices caused by freezing weather which destroyed part of the crop. Since Lookout has paid Bonita the market price for the tomatoes and for palletizing according to the contract between the parties, Bonita's claim will be dismissed.

ORDER

The complaint is hereby dismissed.

Copies shall be served upon the parties.

A. DUDA & SONS, INC. v. PETE PAPPAS & SONS. PACA Docket No. 2-6940. Decided October 17, 1986.

Contracts—Open price term—Contract term, "To be priced on next week's market"—Contracts, Objective theory followed.

Complainant sold and shipped a truck load of tomatoes of varying grades and sizes to respondent "to be priced on next week's market". This open price term was used because the parties expected unsettled market conditions due to a freeze at shipping point at about the time the contract was made. Complainant contended the term should be interpreted to refer to prices at the beginning of the following week, whereas respondent contended that, since the market remained unsettled for over two weeks, it should be allowed to pay complainant on the basis of its actual sales of the tomatoes. It was held that contract prices should be determined on the basis of actual shipping point market prices as reflected by Federal State Market News Service reports during the entire following business week.

George S. Whitten, Presiding Officer.

Craig A. Bromby, Oviedo, Florida, for complainant.

George J. Charles, Washington, D.C., for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$4,752.00 in connection with the shipment in interstate commerce of a truckload of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent did not file an answering statement. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, A. Duda & Sons Inc., is a corporation whose address is P.O. Box 257, Oviedo, Florida.

2. Respondent, Pete Pappas & Sons, is a partnership composed of Peter G. Pappas and Philip G. Pappas, whose address is P.O. Box 1292, Washington, D.C. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about January 22, 1985, complainant sold to respondent one truckload of tomatoes as follows: 288 cartons of 5×6 size, U.S. No. 2 grade, Homegrown brand; 504 cartons of 5×6 size, approximately 85% U.S. No. 1 grade, Beefsteak brand; and 792 cartons of 6×6 size, approximately 85% U.S. No. 1, Beefsteak brand; all "to be priced on next week's market".

4. The tomatoes were shipped on January 22, 1985, from Naples, Florida to respondent in Washington, D.C., and were accepted by respondent on arrival. On February 11, 1985, complainant invoiced

respondent at the rate of \$14.00 per carton for the 288 cartons of 5×6 U.S. No. 2 tomatoes, \$16.00 for the 504 cartons of 5×6 85% U.S. No. 1 tomatoes, and \$14.00 for the 792 cartons of 6×6 85% U.S. No. 1 tomatoes, or a total, including a palletizing charge of 15¢ per carton, of \$23,421.60. Respondent has paid complainant \$18,669.60 for the tomatoes.

5. The contract between complainant and respondent was negotiated on complainant's part by Robert C. Elliott, a salesman for Gargiulo, Inc., a broker located in Naples Florida, who was employed to act on complainant's behalf by complainant's sales agent, Naples Tomatoes Growers, Inc. The contract was negotiated on respondent's behalf by Frank Detrani of Frank Detrani Distributing Co., Inc., of Naples, Florida.

6. The Florida Fruit and Vegetable report published by Federal-State Market News Service, of Winter Park, Florida recorded the following prices, in relevant part, for tomatoes in South and Central Florida: Sales January 28, of 25 pound cartons of loose Mature Green U.S. combination grade or better; 5×6s-\$15.00, 6×6s-\$14.00; U.S. No. 2; 5×6s-\$13.00-\$13.50, mostly 13, occasional higher. Sales January 29, showed U.S. combination grade or better; 5×6s-\$13.00, 6×6s-\$12.00, and U.S. No. 2; 5×6s-\$11.00. Federal State Market News reports for Jessup-Maryland reporting f.o.b. shipping point sales for South and Central Florida showed tomatoes on Tuesday, January 29, 1985, selling on an f.o.b. shipping point basis as follows: 25 pound cartons of loose Mature Green 85% or better U.S. No. 1 quality; 5×6s-\$13.00, 6×6s-\$12.00. The same report showed sales on Wednesday, January 30, 1985, as follows: "Weaker Undertone. Too few sales to establish a market." The same report for Thursday, January 31, 1985, showed sales as follows: 25 pound cartons of loose Mature Green U.S. combination grade or better; 5×6s-\$10.00, few \$9.00, 6×6s-\$9.00, few lower.

7. The formal complaint was filed on March 13, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

In this case we are refreshingly confronted with a situation in which both parties have acted with apparent integrity, but have a good faith dispute over the meaning to be given to a somewhat vague term used in their contract. Complainant and respondent, and the brokers involved in the negotiation of the contract, all agree that due to a freeze in Florida at about the time the contract was made, which was expected to cause unsettled conditions in the tomato market, the tomatoes were sold "to be priced on next week's market". It is clear that by next week the parties intended

to refer to the business week beginning Monday, January 28, 1985. However, complainant maintains that the phrase should be taken to refer to prices at the beginning of the week, whereas respondent maintains that the market remained unsettled for over two weeks following the sale, and since it sold the tomatoes on the best possible terms, it should be allowed to pay complainant in the light of the market it actually experienced.

Both parties characterized the price term used by them as an "open price term", and argue for their respective positions on this basis. It is true that the term employed generically falls into the category of an open price term as those words are used in UCC section 2-305, i.e. "The parties if they so intend can conclude a contract for sale even though the price is not settled". However, the succeeding sentence providing for a reasonable price at time of delivery does not apply since none of the three prescribed conditions is applicable. The first proviso: "if nothing is said as to price", clearly does not apply. Something was said as to price, namely "to be priced at next week's market." The second proviso: "if the price is left to be agreed by the parties and they fail to agree", also does not apply since the price was not left to be agreed to by the parties. The third proviso "if the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded", also does not apply. Although it is true that the price was to be fixed in terms of an agreed market, namely the f.o.b. shipping point tomato market, and that market was recorded by a third person, namely the Federal-State Market News Service, it cannot be said that such market was not set or recorded.

While complainant has argued that the term "next week's market" was not tied to any market reporting service, and that such is not contended by either party, we think that the record herein establishes otherwise. Both parties, throughout this proceeding, have continually made reference to both the shipping point and destination point Federal-State Market News Service reports and have supplied, at various times, copies of such reports as a part of the record herein. Furthermore, such reports, in point of fact, are based upon actual sales of the specified commodities and therefore establish, to the extent relevant sales were recorded, what the actual market for a given commodity was. Although both complainant and respondent submitted copies of the market reports in support of their respective positions, neither party appears willing to rely wholly upon such reports. Respondent seeks to pay complainant on the basis of its actual sales plus a profit, and complainant suggests that if we do not use the market for the first part of the

next week, prices should be based upon its actual sale prices during such period of time. Respondent complains that the market as reflected by the Market News Service reports was unsettled during the applicable period, and complainant complains that the market reports simply do not adequately report on the specific quality of merchandise involved in this tomato transaction. We conclude that both complainant and respondent are wrong. The Market News Service reports are from a neutral source, are based upon objective sales, and should be used if at all possible.

As to the meaning of the term "to be priced on next week's market" we have no hesitation in ascribing to such term its plain and simple meaning. We see no reason to interpret the term to mean the first part of the next week, the last part of the next week, or the middle of the next week. Complainant's sales agent, Robert C. Elliott, stated in a sworn statement submitted as a part of complainant's opening statement, that "it was my intent that the term 'next week's market' meant the market price, f.o.b. Naples, Florida at the beginning of the following week, . . ." While we do not doubt that this is precisely what Mr. Elliott meant by the term, there is absolutely no way that the person with whom he was dealing could know of such intended meaning in the absence of verbal expression of such meaning. See *Anonymous*, 8 Agric. Dec. 374 (1949). Complainant's credit manager, Henry L. Clark, in a letter to this Department adopted what we feel is the only possible interpretation of the term: "We maintain that the intent and interpretation of 'next week's market' means just that, next week's prices. It does not, as the respondent suggests, mean those prices two weeks from now, or when the market is settled, or when the respondent feels the price is right."

Although each of the parties submitted numerous copies of Market News Service reports, most of these reports are irrelevant to the time period with which we are concerned. Complainant submitted f.o.b. shipping point Market News Service reports covering only Monday and Tuesday of the week of January 28, 1985. Respondent submitted destination Market News Service reports for each day of the entire two weeks following the sale of the subject tomatoes. However, in each case the page giving shipping point tomato quotations was omitted. Later, respondent submitted additional destination Market News Service reports which included the page giving shipping point quotations, but the reports covered only Tuesday, January 29, Wednesday, January 30, and Thursday, January 31, 1985. The Monday and Tuesday shipping point reports submitted by complainant do not give quotations for 85% U.S. No. 1 tomatoes, but rather for "U.S. combination grade or better" toma-

atoes. However, the Jessup, Maryland Market News Service report in giving f.o.b. shipping prices for South and Central Florida on Tuesday, January 29, quotes 85% or better U.S. No. 1 quality tomatoes size 5×6 and 6×6 at \$13.00 and \$12.00 respectively, or the same identical price given by the Winter Haven Market News Service report for f.o.b. shipping point prices from South and Central Florida on the same date. We conclude that at the time U.S. combination grade and 85% U.S. No. 1 were selling at or about the same prices. Averaging the available prices for each category of tomatoes over the week of January 28 (the parties did not submit a Market News report covering f.o.b. shipping point prices for Friday, February 1, 1985, and the available reports give no prices in any of the categories of tomatoes for Wednesday, and no prices for the U.S. No. 2s for Tuesday or Thursday) the 85% U.S. No. 1 5×6 tomatoes had an average price for the week of \$12.66, the 85% U.S. No. 1 6×6 tomatoes had an average price for the week of \$11.66, and the U.S. No. 2 5×6 tomatoes had an average price for the week of \$12.00. Multiplying these average prices by the number of cartons in each category, and adding 15¢ per carton for palletizing in accordance with the contractual agreement between the parties, yields a total f.o.b. price for the truckload of \$19,308.96. Respondent has already paid complainant \$18,669.60, which leaves a balance still due of \$639.36. We conclude that respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$639.36, with interest thereon at the rate of 13 percent per annum from March 1, 1985, until paid.

Copies of this order shall be served upon the parties.

MISCELLANEOUS REPARATION DECISIONS

KENT W. NORTHCROSS, d/b/a NORTHCROSS DISTRIBUTING, *v.* GEORGE VILLALOBOS, d/b/a TEKSUN BRAND INTERNATIONAL. PACA Docket No. 2-6824. Decided September 3, 1986.

Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Deci-

sion and Order was issued on June 12, 1986, requiring that respondent pay complainant, as reparation, \$46,767.26 plus interest at the rate of 13% per annum from April 1, 1984, until paid. The Order was served on respondent who, on July 16, 1986, returned it to the Department by a letter dated July 8, 1986. In his letter, respondent claimed that certain exhibits he offered should not have been excluded from the record, and that he had difficulty in "understanding the procedures followed by" the Department. This letter is being treated as a petition for reconsideration filed pursuant to 7 CFR § 47.24.

The documents which were referred to by respondent as allegedly being excluded from the record were documents which were submitted by respondent after the case had been closed for the submission of evidence. Moreover, the documents were cumulative in that copies of them had already been submitted by complainant. Thus, the presiding officer properly refused to accept them into evidence. 7 CFR § 47.24.

Respondent's claim that he had difficulty in understanding our procedures has no merit as a ground for seeking reconsideration. Our procedures are spelled out in the Code of Federal Regulations, and are detailed in all our correspondence with the parties. Moreover, presiding officers are available to discuss these matters with parties to reparation proceedings. Additionally, and in view of the amount in dispute it would have been prudent to do so, respondent could have retained counsel.

Upon review of the record, we are of the opinion that respondent's claims in his petition for reconsideration are without merit, and we conclude that our order of June 12, 1986, is amply supported by the evidence and by the law applicable thereto. Accordingly, respondent's petition for reconsideration is denied without prior service upon complainant.

The order of June 12, 1986, is reinstated except that payment shall be due within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

BECKMAN PRODUCE, INC., *v.* MARVIN G. HOLPERIN, d/b/a UNIQUE FOODS, Co. PACA Docket No. 2-7116. Order issued September 3, 1986.

Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$4,372.41 in connection with a transaction involving shipments of mixed produce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated July 7, 1986, complainant notified the Department that this matter had been fully settled. Complainant, in its letter of July 7, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

LISA, INC., *v.* THE PRODUCE EXCHANGE. PACA Docket No. 2-7212. Order issued September 3, 1986.

Donald A. Campbell, Judicial Officer

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$30,042.99 in connection with a transaction involving the shipment of tomatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By mailgram dated July 9, 1986, complainant authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

RAINIER FRUIT SALES, INC., v. BEN VASQUEZ PRODUCE, INC. PACA
Docket No. 2-7225. Order issued September 3, 1986.

Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$8,648.50 in connection with transactions involving the shipment of apples and pears in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated July 18, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of July 18, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

MONSON BROS. CO., v. SUN TRADING CO., INC. PACA Docket No. 2-6322. Notice issued September 29, 1986.

Donald A. Campbell, Judicial Officer.

NOTICE TO SHOW CAUSE

A formal complaint was filed in this proceeding on November 1, 1982, in which complainant asked for damages of \$44,260.00. An answer and counterclaim was filed on July 5, 1983, in which respondent claimed damages of \$31,295.00. An oral hearing was originally set for September 25, 1984. At the request of the parties, it was postponed indefinitely.

This tribunal has made several efforts since September 25, 1984, to reset this matter for oral hearing, but the parties have consistently requested such action not be taken. In a telephone conversation on September 9, 1986, Ms. Marlene Monson, an official with complainant, advised this tribunal that respondent had paid all of complainant's original claim. She was advised at that time that this tribunal would issue a Notice to Show Cause why this proceeding should not be dismissed.

ORDER

The complainant is given 20 days from the date of this order to show cause why this proceeding should not be dismissed for failure to prosecute.

The respondent is given 20 days from the date of this order to show cause why its counterclaim should not be dismissed.

Copies of this order shall be served upon the parties.

PRO-VEG, INC., *v.* M & M PRODUCE FARMS AND SALES a/t/a ZYGMUND ROGOWSKI & SONS. PACA Docket No. 2-6793. Decided October 1, 1986.

Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on July 18, 1986, dismissing the complaint. On August 8, 1986, the Department received a letter from complainant in which it claims that it "does not agree with [our] Conclusions, page 2." As we understand complainant's petition, it claims that we erred in concluding that the respondent's \$4,193.00 was accepted by it in full settlement of the parties' dispute. However, before complainant negotiated the respondent's check, it was notified by the Department that the respondent had refused to release the check as an undisputed amount. Under these circumstances, complainant cannot say that it had no notice that its acceptance of the check would result in an accord and satisfaction.

Complainant also claims that it should have been allowed to file a statement in reply. However, as the respondent did not file an answering statement, the Rules of Practice did not permit such a filing and the presiding officer properly rejected complainant's filing. *See* 7 CFR § 47.20(e). Had complainant desired to respond to respondent's answer, it should have filed an opening statement as solicited in the presiding officer's May 10, 1985, letter, but it failed to do. In any event, we have perused the statements in its proposed statement in reply and can see nothing which would have changed our decision.

Upon review of the record, we are of the opinion that complainant's claims are without merit, and we conclude that our order of July 18, 1986, is amply supported by the evidence and by the law

applicable thereto. Accordingly, complainant's petition for reconsideration is dismissed without prior service upon respondent.

The order of July 18, 1986, is reinstated.

Copies of this order shall be served upon the parties.

CALIFORNIA PRODUCE DISTRIBUTORS, INC., *v.* GUS' WHOLESALE MEAT & FOOD CO. PACA Docket No. 2-6927. Order issued October 1, 1986.

George S Whitten, Presiding Officer

Thomas I. Rozsa, Los Angeles, California, for complainant.

S. Philip Cabibi, Pueblo, Colorado, for respondent.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF CONTINUANCE

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of \$28,573.15 against respondent in connection with transactions in interstate commerce involving shipments of fruits and vegetables. A copy of the formal complaint was served upon respondent, and respondent has filed an answer thereto.

Complainant, California Produce Distributors, Inc., is a corporation whose address is 751 Merchant Street, Los Angeles, California. Respondent, Gus' Wholesale Meat and Foods Co., is a corporation whose address is P.O. Box 4225, Pueblo, Colorado. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the issuance of a Decision and Order in this proceeding, the Department was advised that respondent had filed in the United States Bankruptcy Court, District of Colorado, a voluntary petition of reorganization pursuant to Chapter XI of the Bankruptcy Act (11 U.S.C. §§ 1101-1174). The Department also was advised that a discharge in the bankruptcy proceeding would be a release of the claim before the Department.

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 11 proceeding now pending in the United States Bankruptcy Court has been closed, dismissed, or converted to straight bankruptcy, or that the

debts have been discharged through confirmation of a Plan of Arrangement.

Copies hereof shall be served upon the parties.

TOP QUALITY FRUIT & PRODUCE DIST., INC., *v.* VOLLMER PRODUCE, INC. PACA Docket No. 2-7077. Order issued October 1, 1986.

Donald A. Campbell, Judicial Officer.

ORDER OF CONTINUANCE

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of \$4,793.95 against respondent in connection with transactions in interstate commerce involving shipments of mixed produce. A copy of the formal complaint was served upon respondent, and respondent has filed an answer thereto. On March 12, 1986, an Order Requiring payment of \$2,630.60 as an undisputed amount was issued.

Complainant, Top Quality Fruit & Produce Dist., Inc., is a corporation whose address is P.O. Box 6208, McAllen, Texas 78502. Respondent, Vollmer Produce, Inc., is a corporation whose address is Route 4, Box 1360 Hwy. 6, Navosota, Texas 77868. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the issuance of a final ruling in this proceeding, the Department was advised that respondent had filed, in the United States Bankruptcy Court for the Southern District of Texas, a voluntary petition of reorganization pursuant to Chapter 11 of the Bankruptcy Act (11 U.S.C. §§ 1101-1174), which has been designated docket no. 86-107-82-H3-11.

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 11 proceeding now pending in the United States Bankruptcy Court has been closed, dismissed, or converted to straight bankruptcy, or that the debts have been discharged through confirmation of a Plan of Arrangement.

Copies hereof shall be served upon the parties.

JACK T. BAILLIE CO. INC., *v.* INTERNATIONAL A.G., INC. PACA
Docket No. 2-7251. Order issued October 1, 1986.

Donald A. Campbell, Judicial Officer

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$2,217.30 in connection with a transaction involving the shipment of lettuce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated August 15, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of August 15, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

GOLD COAST PACKING, INC., *v.* H. SCHNELL & COMPANY, INC., and/or
LLOYD MYERS Co., INC. PACA Docket No. 2-6414. Order issued
October 16, 1986.

Donald A. Campbell, Judicial Officer.

ORDER DISMISSING SECOND PETITION FOR RECONSIDERATION

A Decision and Order was issued in this matter on December 17, 1984, awarding reparation to complainant against respondent H. Schnell & Company in the amount of \$3,404.00 plus interest, and against respondent Lloyd Myers Co., Inc. in the amount of \$7,522.00 plus interest. On January 30, 1985, the order of December 17, 1984, was stayed, and respondent Lloyd Myers Co., Inc. was allowed to file a petition to rehear, reargue and reconsider. On May 15, 1985, we granted rehearing of this matter, and the record was reopened to receive new evidence. After receiving evidence from the parties and again closing the record an Order Upon Rehearing was issued on April 9, 1986, reaffirming and reinstating our prior order. On May 8, 1986, respondent Lloyd Myers Co., Inc., filed another petition to reconsider. On May 27, 1986, the order of April 9, 1986, was stayed pending the issuance of a further order in this case.

We have thoroughly reconsidered, for the second time, our order of December 17, 1984, in the light of the record in this proceeding. Aside from the question of whether respondent Lloyd Myers Co., Inc., received the economic benefit of the check issued to it by A & J Produce Corp., we believe that the record supports the conclusion that Lloyd Myers Co., Inc. ordered the load of broccoli for H. Schnell & Company, Inc. without its authorization, and diverted the car, without the authorization of either complainant or H. Schnell & Company, Inc. to A & J Produce Corp. The record further discloses that Lloyd Myers Co., Inc. issued a broker's memorandum of sale to A & J Produce Corp. directing that company to pay Lloyd Myers Co., Inc. for the produce. These actions were a violation of respondent Lloyd Myers Co., Inc.'s duties as a broker, and a violation of the Act, which resulted in complainant not being paid for the produce. We find that our order of December 17, 1984, requiring that Lloyd Myers Co., Inc. pay complainant, as reparation, the sum of \$7,522.00, with interest is supported by the evidence of record and the law applicable thereto. That order is hereby reinstated, except that the reparation awarded therein, with interest, shall be paid within 30 days from the date of this order.

In *W. J. Wescott v. Yonk Rubin & Son and/or A. L. Schiano*, 10 Agric. Dec. 358 (1951), the opinion was expressed that the Secretary has the discretion whether to allow a party to file more than one petition for reconsideration. As stated therein, the administrative consideration of a proceeding must be brought to a conclusion at some time. No further petition for reconsideration by respondent Lloyd Meyers Co., Inc., will be accepted for filing in this proceeding.

Copies of this order shall be served upon the parties.

GLOBAL TRADING, INC., *v.* LIMPERT BROS., INC. PACA Docket No. 2-6679. Decided October 16, 1986.

George S. Whitten, Presiding Officer.

David B. Ward, Greenville, South Carolina, for complainant.

Mitchell H. Kizner, Vineland, New Jersey, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION AND DENYING PETITION TO REOPEN

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), an order

was issued December 11, 1985, awarding reparation to complainant against respondent in the amount of \$8,227.10. On December 26, 1985, respondent filed a petition for reconsideration and reopening. On February 4, 1986, a stay order was issued giving complainant an opportunity to file an answer to the petition to reconsider and reopen. Such answer was duly filed, and respondent filed a reply to such answer on April 28, 1986.

One of the matters raised in respondent's petition to reconsider concerns an alleged custom and practice in the industry which respondent states contravenes the Department's regulations. Consequently, respondent has requested that "if additional testimony is necessary with respect to custom and practice in the industry or with respect to the Department of Agriculture's own procedures, the record could be reopened for that purpose." It is well settled that where the evidence could have been submitted at the original hearing a proceeding will not be reopened to receive such evidence. See *Monc's Consolidated Produce, Inc. v. Black Diamond Fruit & Produce Company, Inc., and/or Kenneth C. White*, 36 Agric. Dec. 97 (1977). The only possible exception to this rule is where evidence comes to light after the close of a hearing which clearly shows a fundamental factual determination to have been in error. Even then, if the failure to offer such evidence was through negligence or oversight of counsel we would not reopen. Clearly, this is not a proceeding which should be reopened.

Respondent states in its petition to reconsider that the decision reached by this Department "unfairly rewards a party which has engaged in reprehensible, deceptive and fraudulent business practices", and is "based upon an incorrect understanding of custom and practice in the industry and of the United States Department of Agriculture's own procedures". Respondent further states that our decision "discounted, and indeed almost overlooked the basic, largely undisputed fact underlying this dispute." Respondent then goes on to detail its basic allegation that the pineapple which it received from complainant did not measure up to the sample which complainant had previously submitted. Respondent further alleges that:

In rendering a decision for the Complainant the Judicial Officer abandoned any sense of fairness in favor of a wooden adherence to those regulations contained in § CFR 7 which set forth certain rigid time limits for the rejection of fruit. However, in reaching his decision the Officer completely overlooked the unchallenged testimony of the Respondent's President that custom and practice in the in-

dustry is that when dealing with what is believed to be a reputable seller, a buyer does not have to immediately inspect a shipment of hard frozen fruit.

There are two fundamental points which require the result which we reached in our decision and order of December 11, 1985. First, is the evident fact of respondent's acceptance of the frozen pineapple. Our decision of December 11, 1985, thoroughly covers this point and shows why, under the Department's regulations, and under our prior decisions, respondent must be deemed to have accepted the product. Against this respondent urges industry custom and practice. However, it is a fundamental premise of administrative law that an agency is bound by its own regulations. *United States v. Nixon*, 418 U.S. 683, 693-696, 94 S.Ct 3090, 41 L.Ed. 2d 1039 (1974); and *Service v. Dulles*, 354 U.S. 363, 77 S.Ct 1152, 1 L.Ed. 2d 1403 (1957). Accordingly, respondent must fail in its effort to overthrow the December 11, 1985, decision on this point.

Respondent's acceptance of the product, standing alone, did not preclude respondent from prevailing in this proceeding. As we noted in our conclusions, "the testimonial evidence supports respondent's contention" that the pineapple which respondent accepted did not conform to the sample previously sent by complainant. This brings us to the second major point which, taken with respondent's acceptance, precludes a decision in respondent's favor in this case. As we stated in the December 11, order "respondent totally failed to submit any evidence which would form a basis for computing damages in this proceeding." Respondent did not submit an accounting covering the resale of the 511 cases of pineapple which it accepted, and indeed there was no showing that the pineapple was in fact resold. As we stated, "without such accounting . . . or some other way of determining the value of [the] product at time of delivery we cannot award damages which result from any breach." Respondent has not proposed any remedy for its failure to offer this evidence, nor has respondent seemed to grasp the significance of its failure. Assuming that respondent was now to be allowed to offer additional proof that the contract was breached, and was to succeed in convincing us that we should so decide, respondent still would not prevail due to its failure to prove damages resulting from such breach.

Respondent's failure to prove damages was the underlying reason for our discussion concerning the import to be given to the substandard grade accorded to the product accepted by respondent. Nothing that respondent has submitted or proposed to submit undercuts the conclusion reached in our prior decision that a substandard grade does not render product unmerchantable and with-

out commercial value. Although respondent now professes to be able to prove that the substandard product in fact had a score of 71, respondent even now does not allege that it can show that such a score would be proof that the product had no commercial value. Only a showing that this product had no commercial value would be relevant, in the absence of an accounting covering a resale of the product, to show damages in this case.

Upon reconsideration we find that the order of December 11, 1985, is supported by the evidence and the law applicable thereto. Accordingly, the Petition for Reconsideration and the Petition to Reopen are hereby dismissed.

Copies of this order shall be served upon the parties.

MIC BRUCE, INC., a/t/a SINGER's v. CHIQUITA BRANDS, INC. PACA
Docket No. 2-6608. Decided October 17, 1986.

Dennis Becker, Presiding Officer.

Stephen P. McCarron, Silver Spring, Maryland, for complainant.

Richard J. Reiset, New York, N.Y., for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

A Decision and Order was issued in this proceeding on May 1, 1986. A Motion For Reconsideration was filed by complainant on May 13, 1986, as a result of which the Order was stayed on June 10, 1986. Respondent filed a Response To Complainant's Petition For Reconsideration And Cross-Petition For Reconsideration on July 21, 1986.

Full consideration has been given to the arguments made by both parties in their pleadings, as well as relevant portions of the record. Based on our review of the facts and law, we conclude that the Motion For Reconsideration should be denied. Respondent's Cross-Petition For Reconsideration was apparently to be considered by this tribunal only if complainant's motion was granted. As will be discussed more fully below, it would be denied in any event.

Complainant has set forth two bases as to why the Decision should be reconsidered. First it claims that the tribunal misconstrued controlling legal principles in determining the appropriate measure of damages. Complainant believes that the Decision is inconsistent insofar as it states that the complainant did not accept the claim and settlement procedures followed by respondent, but later states that "damages are limited to no more than what was

requested in [complainant's] formal written claims submitted to respondent . . . pursuant to Chiquita's claim and settlement procedures". Complainant is incorrect in its reading of the Decision. As was pointed out by respondent in its response the word "and" did not appear between the words "claim" and "settlement" in the discussion of the procedures. As was fully discussed in the Decision, by its course of conduct complainant had accepted the claim procedure, which may also be considered to be claim settlement procedures, set forth in respondent's invoices. That to which complainant had never agreed were the actual settlement terms and conditions unilaterally imposed by respondent extraneous to the procedures for filing claims which might lead to settlement, but which were not included as part of the invoices used by respondent over the years. Indeed, had respondent set forth on its invoices appropriate terminology it could have bound both parties to accept whatever amount of settlement respondent offered if a course of conduct was established over a period of time. We find the other arguments made by complainant with respect to the issue of determining the measure of damages to be saving arguments only, which we need not deal with in this Order on Reconsideration.

The second ground raised by complainant in its Motion For Reconsideration deals with loads 11 through 13 in the complaint. This tribunal denied recovery with respect to these three loads because it found that complainant failed to sustain its burden of proof that the bananas did not make good delivery. The major basis for the conclusion of the tribunal was that complainant did not file a claim of any kind with respect to the three loads until 5 or 6 days after the arrival of the bananas at its place of business, as a result of which it was not possible to determine who was responsible for the deterioration in the bananas. Complainant asked that this determination be overturned by referring to what are known as "after-ripe inspection" reports, which reports are based on inspections carried out by Chiquita for all loads of bananas which are unloaded from ships, usually a week or so after such unloading. While the specific after-ripe inspection report relied upon by complainant shows that with respect to the bananas involved in transactions 11 through 13 there were a high number of defects, we conclude that an inspection at a place other than complainant's business of a sample of bananas taken from ship is not sufficiently probative of the condition of the bananas at complainant's place of business several days after they have arrived. There are many possible distinctions to be made between specific lots of bananas and a sample taken from an entire ship. In essence, the after-ripe inspection is too remote in time, and there are too many possible extraneous factors, for us to

conclude that it may be relied upon to show the condition of the bananas at complainant's place of business several days after arrival, and to attribute any deteriorated condition to respondent. For example, complainant's bananas came from hold number 4. The after-ripe inspection report does not show how the bananas were segregated by hold. Bananas from hold number 4 may have been all right. The high percentage of defects may have occurred with bananas from holds number 1, 2 and 3. Complainant has a higher burden than merely to show by a somewhat remotely related report that respondent may have delivered bananas which were not in accordance with contract specifications. Furthermore, we subscribe to the theory of respondent in its response to complainant's Petition For Reconsideration that the kinds of defects set forth in the after-ripe inspection report were not related to the primary claim of complainant that there was underpeel discoloration.

Although it is not necessary to do so this tribunal wishes to speak to respondent's Cross Petition for Reconsideration. The claim of respondent that there is an industry custom and practice of settling banana claims on an f.o.b. basis needs little elaboration over and above that which was set forth in the Decision and Order previously issued. Respondent failed to address the fact that industry practice needs to be shown not by self serving claims of shippers of bananas, but rather by testimonial and documentary evidence provided by receivers of bananas.

Respondent's claim that it is inequitable and unjust to award complainant all the and expenses fees claimed when it only received 19% of its total claim is without merit. Respondent attached as an exhibit to its cross-petition a prior letter from respondent to complainant offering settlements somewhat near the amount of money which was ultimately awarded by this tribunal. This letter has not been considered because it was not properly filed, and because in any event offers of settlement are not appropriate for consideration. Respondent has also reasoned that it won the case because 81% of the claim of complainant was disallowed. Respondent's reasoning in this regard is erroneous. The Secretary of Agriculture has determined that to award fees and expenses based upon the percentage of a claim allowed would not be in the public interest. It would discourage a complaining party from filing a valid claim merely because it might receive less than all of its claim, and have to pay fees and expenses. It is well established in American judicial practice that claims usually exceed the amount actually awarded. Furthermore, under the PACA respondents have an alternative approach to the defense of large claims under which they may receive the award of attorney's fees and other expenses.

They may admit liability and submit payment for that portion of the total claim for which they believe they may be liable. Then, a respondent may defend the remainder of the claim, and if it is correct and prevails, will be awarded its fees and expenses. The policy of the Secretary of Agriculture in this regard is long standing, has worked well, and is equitable and just. Rather than discourage settlements, it moves the parties forward towards fair resolutions of their dispute short of oral hearing, and assures that the party which prevails receives the fees and expenses to which it is entitled. That is not to say that if the Secretary found in an individual case that a complainant filed a lawsuit asking for an extreme amount of money, or its claim was otherwise unreasonable, the Secretary would not scrutinize closely this policy to determine whether an exception should be made.

ORDER

Complainant's Motion For Reconsideration is denied. Respondent's Cross-Petition For Reconsideration is denied. The Order dated May 1, 1986, is reinstated except for effective dates and the dates for the computation of interest, as set forth below.

Within thirty days from the date of this order respondent shall pay to complainant, as reparation, \$6,204.43, with interest thereon at the rate of 13 percent per annum from May 1, 1983, until paid.

Within thirty days from the date of this order respondent shall pay to complainant, as reparation, \$4,448.10, with interest thereon at the rate of 13 percent per annum from July 1, 1983, until paid.

Within thirty days from the date of this order respondent shall pay fees and expenses to the complainant, as reparation, in the amount of \$6,482.10, with interest thereon at the rate of 13 percent per annum from the date of this order until paid.

Copies of this order shall be served upon the parties.

AGRI-PAK FRUIT CO., v. NICHOLSON PRODUCE CO., INC., and/or SO. CENTRAL BROKERAGE, INC. PACA Docket No. 2-6723. Decided October 17, 1986.

Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on June 27, 1986, awarding reparation to complainant in the amount of \$2,232.00 with interest at the rate

of 13% per annum from December 1, 1983, until paid, against respondent Nicho Produce Co., Inc. ("Nicho"). After the Department received an undated letter from Nicho requesting the time to file a petition for reconsideration, the Decision and Order was stayed on August 18, 1986, and Nicho was given 15 days from service of the Order to file such a petition. On September 3, 1986, a letter was received from a Mr. B.R. Stockton which was typed on the letterhead of Westlake Distributors, P.O. Box 8245, Fresno, California 93727, in which he expresses some concerns regarding our Decision and Order in this matter and attempts to amplify the record regarding the history of the subject grapes before they were shipped to Nicho. So far as the record reflects, Westlake Distributors has no interest in this matter either financial or otherwise. However, as in its request for a stay Nicho indicated that it needed more time "in order to get an affidavit from Mr. Bob Stockton, who is presently out of the country," the letter from Mr. Stockton is accepted as Nicho's petition for reconsideration.

Mr. Stockton, in his letter, claims that he (although he never explains his relationship, past or present, to any of the parties to this proceeding) never expected that Nicho would be held responsible for this load of grapes. He further goes on to claim that the grapes had been in storage and that "Nicho was justified in their [sic] rejection of" them. On the face of his letter, it appears as if Mr. Stockton may have had something of value to contribute to this proceeding which might have been helpful to Nicho's presentation of its defense. However, the sparse facts contained in his letter must be characterized as "too little, too late." Under the Rules of Practice, 7 CFR § 47.24, petitions to reopen a reparation proceeding for the taking of further evidence, and Mr. Stockton's letter would have to be construed as such, must be filed with the presiding officer prior to the issuance of the final order. As the final order in this case was issued on June 27, 1986, a petition to reopen this matter should not be entertained. In any event, without substantially more facts than are contained in Mr. Stockton's letter, such as his involvement in the transaction, the source of his knowledge as to the condition of the grapes when shipped to Nicho by complainant, etc., we cannot say that his letter, even if filed prior to the issuance of our June 27, 1986, Decision and Order would have swayed us to rule in Nicho's favor.

Upon review of the record, we are of the opinion that Nicho's claims are without merit, and we conclude that our Decision and Order of June 27, 1986, is amply supported by the evidence and the law applicable thereto. Accordingly, Nicho's petition for reconsideration is dismissed without prior service upon complainant.

The Order of June 27, 1986, is reinstated except that the reparation awarded therein shall be paid within 30 days from the date of this Order.

Copies of this Order shall be served upon the parties.

GRASSO FOODS, INC., *v.* THE QUAKER OATS COMPANY. PACA Docket No. 2-6869. Decided October 23, 1986.

Donald A. Campbell, Judicial Officer.

CORRECTED ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on October 3, 1986, awarding reparation to complainant in the amount of \$13,200.00 plus interest. In that order, the interest rate was stated as being "13% per month." Such rate was misstated. The correct interest rate should have been stated as being "13% per annum." Accordingly, the October 3, 1986, Order is corrected to read as follows:

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$13,200.00 plus interest at the rate of 13% per annum from December 1, 1984, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

Respondent shall have thirty days from the date of this corrected order in which to make payment to complainant of the amount noted above.

Copies of this corrected order shall be served upon the parties.

REPARATION DEFAULT DECISIONS ISSUED BY
DONALD A. CAMPBELL, JUDICIAL OFFICER

J. A. WOOD CO.-VISTA INC. a/t/a J. A. WOOD CO. v. ANTHONY MOREALI, JR. d/b/a PACIFIC COAST PRODUCE BROKERAGE. PACA Docket No. RD-86-404. Decided September 2, 1986.

Respondent was ordered to pay complainant, as reparation, \$4,199.30 plus 13 percent interest per annum from January 1, 1985, until paid.

D. H. JOHNSON & SONS INC. v. NORTHEAST PRODUCE DEALERS INC. PACA Docket No. RD-86-405. Decided September 2, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,650.00 plus 13 percent interest per annum from December 1, 1985, until paid.

ROY PIPPIN FARMS INC. v. DELEGAL CORPORATION. PACA Docket No. RD-86-406. Decided September 2, 1986.

Respondent was ordered to pay complainant, as reparation, \$85,572.75 plus 13 percent interest per annum from December 1, 1985, until paid.

UROZA PRODUCERS, S.A. v. UNION PRODUCE DISTRIBUTORS. PACA Docket No. RD-86-407. Decided September 2, 1986.

Respondent was ordered to pay complainant, as reparation, \$10,395.41 plus 13 percent interest per annum from November 1, 1984, until paid.

GOLD COAST PACKING INC. v. MELON PRODUCE INC. PACA Docket No. RD-86-395. Decided September 10, 1986.

Respondent was ordered to pay complainant, as reparation, \$52,082.50 plus 13 percent interest per annum from November 1, 1985, until paid.

MILLS DISTRIBUTING COMPANY *v.* BEST PRODUCE CO. INC. a/t/a NEW AIRLINE PRODUCE CO. PACA Docket No. RD-86-408. Decided September 22, 1986.

Respondent was ordered to pay complainant, as reparation, \$2,900.00 plus 13 percent interest per annum from October 1, 1985, until paid.

ARNULFO M. FIGUEROA and JUAN A. FIGUEROA d/b/a A. F. & SON BRKGE. *v.* TRAYMAN INC. PACA Docket No. RD-86-409. Decided September 22, 1986.

Respondent was ordered to pay complainant, as reparation, \$27,064.30 plus 13 percent interest per annum from August 1, 1985, until paid.

AJM FARMS INC. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-410. Decided September 22, 1986.

Respondent was ordered to pay complainant, as reparation, \$40,159.45 plus 13 percent interest per annum from September 1, 1985, until paid.

JOHN LIVACICH PRODUCE INC. a/t/a ALL FRESH PRODUCE DISTRIBUTORS *v.* GUADALUPE G. FONSECA d/b/a LA-BODEGA. PACA Docket No. Rd-86-411. Decided September 22, 1986.

Respondent was ordered to pay complainant, as reparation, \$5,812.00 plus 13 percent interest per annum from May 1, 1985, until paid.

G. CEFALU & BROTHERS INC. *v.* INTERSTATE PRODUCE INC. PACA Docket No. RD-86-412. Decided September 22, 1986.

Respondent was ordered to pay complainant, as reparation, plus 13 percent interest per annum from April 1, 1985,

KRACAW PRODUCE INC. *v.* KENNER PRODUCE. PACA Docket No. RD-86-413. Decided September 22, 1986.

Respondent was ordered to pay complainant, as reparation, \$688.50 plus 13 percent interest per annum from January 1, 1985, until paid.

BELL'S PRODUCE INC. *v.* ALEX PRODUCE INC. PACA Docket No. RD-86-414. Decided September 23, 1986.

Respondent was ordered to pay complainant, as reparation, \$2,293.95 plus 13 percent interest per annum from August 1, 1985, until paid.

FIRMAN-PINKERTON CO. INC. *v.* TOMMY TUCKER PRODUCE. PACA Docket No. RD-86-415. Decided September 23, 1986.

Respondent was ordered to pay complainant, as reparation, \$4,467.00 plus 13 percent interest per annum from February 1, 1985, until paid.

PRIME PRODUCE CO. INC. *v.* T & T SALES INC. a/t/a LAS VEGAS POTATOE INC. PACA Docket No. RD-86-416. Decided September 23, 1986.

Respondent was ordered to pay complainant, as reparation, \$510.75 plus 13 percent interest per annum from July 1, 1985, until paid.

DON BONANNO CITRUS COMPANY *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-417. Decided September 23, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,434.00 plus 13 percent interest per annum from February 1, 1985, until paid.

4-R FARMS *v.* JAMCO FARMS. PACA Docket No. RD-86-418. Decided September 23, 1986.

Respondent was ordered to pay complainant, as reparation, \$7,831.95 plus 13 percent interest per annum from June 1, 1985, until paid.

BURNAND AND CO. INC. *v.* WESTERN BEST PACKING CO. PACA Docket No. RD-86-419. Decided September 23, 1986.

Respondent was ordered to pay complainant, as reparation, \$33,488.85 plus 13 percent interest per annum from February 1, 1984, until paid.

SUN GLO OF IDAHO INC. *v.* BEACON PRODUCE CO. PACA Docket No. RD-86-420. Decided September 24, 1986.

Respondent was ordered to pay complainant, as reparation, \$13,100.00 plus 13 percent interest per annum from November 1, 1985, until paid.

JACK A. VINCE d/b/a DESERT SUN DISTRIBUTING CO. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-421. Decided September 24, 1986.

Respondent was ordered to pay complainant, as reparation, \$4,705.90 plus 13 percent interest per annum from January 1, 1985, until paid.

C & E ENTERPRISES INC. a/t/a KOYMAM FARMS *v.* VINCENT D. MAENZA d/b/a VINCENT MAENZA BANANA CO. a/t/a MAENZA & SONS. PACA Docket No. RD-86-423. Decided September 24, 1986.

Respondent was ordered to pay complainant, as reparation, \$2,092.80 plus 13 percent interest per annum from November 1, 1985, until paid.

MAUNA KEA AGRONOMICS INC. *v.* GREEN VALLEY CO. INC. PACA
Docket No. RD-86-424. Decided September 24, 1986.

Respondent was ordered to pay complainant, as reparation,
\$16,609.80 plus 13 percent interest per annum from October 1,
1985, until paid.

ONEONTA TRADING CORPORATION *v.* HOUSTON PRODUCE DISTRIBUT-
ING INC. a/t/a HOUSTON FRUIT & VEGETABLE COMPANY. PACA
Docket No. RD-86-425. Decided September 24, 1986.

Respondent was ordered to pay complainant, as reparation,
\$39,182.00 plus 13 percent interest per annum from October 1,
1985, until paid.

SAN ANTONIO FOREIGN TRADING COMPANY *v.* BAKKER SALES INCOR-
PORATED. PACA Docket No. RD-86-426. Decided September 25,
1986.

Respondent was ordered to pay complainant, as reparation,
\$26,559.96 plus 13 percent interest per annum from October 1,
1985, until paid.

SANTO TOMAS PRODUCE ASSOCIATION *v.* EVERFRESH INC. PACA
Docket No. RD-86-427. Decided September 25, 1986.

Respondent was ordered to pay complainant, as reparation,
\$3,259.20 plus 13 percent interest per annum from December 1,
1985, until paid.

ACE TOMATO CO. INC. *v.* P. G. FRUITS INC. PACA Docket No. RD-
86-429. Decided September 25, 1986.

Respondent was ordered to pay complainant, as reparation,
\$15,285.00 plus 13 percent interest per annum from October 1,
1985, until paid.

UNITED DISTRIBUTORS INC. v. SAM W. RELAN d/b/a SAM RELAN SALES. PACA Docket No. RD-86-428. Decided September 25, 1986.

Respondent was ordered to pay complainant, as reparation, \$4,895.00 plus 13 percent interest per annum from July 1, 1985, until paid.

W. E. BITTINGER COMPANY INC. v. BAKKER SALES INCORPORATED. PACA Docket No. RD-86-430. Decided September 25, 1986.

Respondent was ordered to pay complainant, as reparation, \$13,712.50 plus 13 percent interest per annum from February 1, 1985, until paid.

R. B. TODD COMPANY INC. v. VINCENT D. MAENZA d/b/a VINCENT MAENZA BANANA Co. a/t/a MAENZA & SONS. PACA Docket No. RD-86-431. Decided September 25, 1986.

Respondent was ordered to pay complainant, as reparation, \$598.75 plus 13 percent interest per annum from November 1, 1985, until paid.

PEMBERTON PRODUCE INC. v. AL NAGELBERG & Co. INC. PACA Docket No. RD-86-433. Decided October 7, 1986.

Respondent was ordered to pay complainant, as reparation, \$34,030.60 plus 13 percent interest per annum from March 1, 1986, until paid.

SUPREME BANANA Co. INC. v. FRANK GUADAGNO & Co. INC. PACA Docket No. RD-86-435. Decided October 7, 1986.

Respondent was ordered to pay complainant, as reparation, \$14,400.46 plus 13 percent interest per annum from September 1, 1985, until paid.

ASSOCIATED CITRUS PACKERS *v.* ROBERT W. CASTO d/b/a PRIMA CITRUS & FRUIT EXCHANGE. PACA Docket No. RD-86-436. Decided October 7, 1986.

Respondent was ordered to pay complainant, as reparation, \$43,902.00 plus 13 percent interest per annum from January 1, 1986, until paid.

VEG-PAK INC. *v.* M & M PRODUCE INC. PACA Docket No. RD-86-438. Decided October 7, 1986.

Respondent was ordered to pay complainant, as reparation, \$7,055.25 plus 13 percent interest per annum from September 1, 1985, until paid.

BRAVO DISTRIBUTORS INC. *v.* DIXIE PRODUCE SALES. PACA Docket No. RD-86-440. Decided October 8, 1986.

Respondent was ordered to pay complainant, as reparation, \$60,083.70 plus 13 percent interest per annum from February 1, 1986, until paid.

SIGMA PRODUCE CO. INC. *v.* DEWEY H. BOYD d/b/a DIXIE PRODUCE SALES. PACA Docket No. RD-86-441. Decided October 8, 1986.

Respondent was ordered to pay complainant, as reparation, \$132,787.83 plus 13 percent interest per annum from March 1, 1986, until paid.

SOL SALINS INC. *v.* CAPITAL CITY PRODUCE Co. PACA Docket No. RD-86-442. Decided October 8, 1986.

Respondent was ordered to pay complainant, as reparation, \$146,955.13 plus 13 percent interest per annum from October 1, 1985, until paid.

RANCHERO PACKING CO. INC. *v.* JOSEPH PINTO d/b/a JOE PINTO & SON. PACA Docket No. RD-86-443. Decided October 8, 1986.

Respondent was ordered to pay complainant, as reparation, \$5,272.50 plus 13 percent interest per annum from September 1, 1985, until paid.

MILAS G. RUSSELL, JR. *v.* DON PELUCCA. PACA Docket No. RD-86-444. Decided October 8, 1986.

Respondent was ordered to pay complainant, as reparation, \$15,322.50 plus 13 percent interest per annum from December 1, 1985, until paid.

CHASE FARMS INC. *v.* BAKKER SALES INCORPORATED. PACA Docket No. RD-86-445. Decided October 9, 1986.

Respondent was ordered to pay complainant, as reparation, \$17,061.12 plus 13 percent interest per annum from January 1, 1985, until paid.

SILVA HARVESTING CO. *v.* BEACON PRODUCE CO. PACA Docket No. RD-86-446. Decided October 9, 1986.

Respondent was ordered to pay complainant, as reparation, \$83,058.90 plus 13 percent interest per annum from September 1, 1985, until paid.

CHARLES F. ZAMBITO d/b/a ZAMBITO PRODUCE SALES *v.* NORTHEAST PRODUCE DEALERS INC. PACA Docket No. RD-86-448. Decided October 9, 1986.

Respondent was ordered to pay complainant, as reparation, \$18,505.50 plus 13 percent interest per annum from January 1, 1986, until paid.

SOURCE PRODUCE DISTRIBUTING CO. *v.* NORTHEAST PRODUCE DEALERS INC. PACA Docket No. RD-86-449. Decided October 9, 1986.

Respondent was ordered to pay complainant, as reparation, \$23,992.67 plus 13 percent interest per annum from November 1, 1985, until paid.

BIANCHI & SONS PACKING CO. *v.* INTER-TEX ENTERPRISES INC. PACA Docket No. RD-86-450. Decided October 10, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,548.00 plus 13 percent interest per annum from December 1, 1985, until paid.

BIG BEND TOMATO PACKERS INC. *v.* INTER-TEX ENTERPRISES INC. PACA Docket No. RD-86-451. Decided October 10, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,840.00 plus 13 percent interest per annum from July 1, 1985, until paid.

TOM LANGE COMPANY INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-453. Decided October 10, 1986.

Respondent was ordered to pay complainant, as reparation, \$13,519.70 plus 13 percent interest per annum from December 1, 1985, until paid.

MANUEL E. VIEIRA INC. *a/t/a* A. V. THOMAS PRODUCE *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-454. Decided October 10, 1986.

Respondent was ordered to pay complainant, as reparation, \$300.00 plus 13 percent interest per annum from December 1, 1985, until paid.

BUD ANTLE INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-455. Decided October 14, 1986.

Respondent was ordered to pay complainant, as reparation, \$4,659.20 plus 13 percent interest per annum from January 1, 1986, until paid.

ERNIE DALIDIO d/b/a ZAPATA SALES *v.* JOE PINTO & SON INC. PACA Docket No. RD-86-461. Decided October 14, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,442.94 plus 13 percent interest per annum from December 1, 1985, until paid.

LESTER DISTRIBUTING CO. *v.* JOSEPH PINTO d/b/a JOE PINTO & SON. PACA Docket No. RD-86-462. Decided October 14, 1986.

Respondent was ordered to pay complainant, as reparation, \$8,311.94 plus 13 percent interest per annum from November 1, 1985, until paid.

STEGEMAN MARKETING SERVICES INC. *v.* JOE PINTO & SON. PACA Docket No. RD-86-463. Decided October 14, 1986.

Respondent was ordered to pay complainant, as reparation, \$2,738.70 plus 13 percent interest per annum from November 1, 1985, until paid.

HI-VALUE PROCESSORS INC. *v.* JOSEPH PINTO d/b/a JOE PINTO & SON. PACA Docket No. RD-86-464. Decided October 14, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,576.10 plus 13 percent interest per annum from July 1, 1985, until paid.

PAWEL DISTRIBUTING CO. *v.* UNION PRODUCE DISTRIBUTORS. PACA Docket No. RD-86-465. Decided October 15, 1986.

Respondent was ordered to pay complainant, as reparation, \$12,418.08 plus 13 percent interest per annum from January 1, 1986, until paid.

SAM J. MAGLIO, JR. d/b/a MAGLIO & COMPANY v. MARVIN G. HOLPERIN d/b/a/ UNIQUE FOODS Co. PACA Docket No. RD-86-466. Decided October 15, 1986.

Respondent was ordered to pay complainant, as reparation, \$2,689.00 plus 13 percent interest per annum from October 1, 1985, until paid.

FRESH WESTERN MARKETING INC. v. ROBERT W. CASTO d/b/a PRIMA CITRUS & FRUIT EXCHANGE. PACA Docket No. RD-86-467. Decided October 15, 1986.

Respondent was ordered to pay complainant, as reparation, \$3,366.85 plus 13 percent interest per annum from October 1, 1985, until paid.

N. P. DEOUDS INC. v. MANASSAS PRODUCE Co. INC. PACA Docket No. RD-86-468. Decided October 15, 1986.

Respondent was ordered to pay complainant, as reparation, \$11,092.57 plus 13 percent interest per annum from March 1, 1986, until paid.

WATSONVILLE EXCHANGE INC. v. TOC PRODUCE DIST. CORP. PACA Docket No. RD-86-469. Decided October 15, 1986.

Respondent was ordered to pay complainant, as reparation, \$924.00 plus 13 percent interest per annum from October 1, 1985, until paid.

BLUE STAR GROWERS INC. v. HOUSTON PRODUCE DISTRIBUTING INC. a/t/a HOUSTON FRUIT & VEGETABLE COMPANY. PACA Docket No. RD-86-470. Decided October 15, 1986.

Respondent was ordered to pay complainant, as reparation, \$300.00 plus 13 percent interest per annum from August 1, 1985, until paid.

C. H. ROBINSON COMPANY *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-456. Decided October 20, 1986.

Respondent was ordered to pay complainant, as reparation, \$9,522.76 plus 13 percent interest per annum from December 1, 1985, until paid.

WESCAL MARKETING INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-457. Decided October 20, 1986.

Respondent was ordered to pay complainant, as reparation, \$5,623.90 plus 13 percent interest per annum from October 1, 1985, until paid.

J. A. WOOD CO.-VISTA INC. a/t/a A. WOOD CO. *v.* JOE PINTO & SON INC. PACA Docket No. RD-86-458. Decided October 20, 1986.

Respondent was ordered to pay complainant, as reparation, \$3,940.00 plus 13 percent interest per annum from April 1, 1985, until paid.

GOLDEN WEST PACKING CO. *v.* JOE PINTO & SON INC. PACA Docket No. RD-86-459. Decided October 20, 1986.

Respondent was ordered to pay complainant, as reparation, \$6,882.00 plus 13 percent interest per annum from March 1, 1986, until paid.

SUN WORLD INTERNATIONAL INC. *v.* JOE PINTO & SON INC. PACA Docket No. RD-86-460. Decided October 20, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,454.12 plus 13 percent interest per annum from November 1, 1985, until paid.

RAIO PRODUCE COMPANY INC. v. MUNCHY PRODUCE INC. PACA Docket No. RD-86-471. Decided October 21, 1986.

Respondent was ordered to pay complainant, as reparation, \$573.75 plus 13 percent interest per annum from October 1, 1985, until paid.

HAYWOOD COUNTY COOPERATIVE FRUIT AND VEGETABLE ASSOCIATION INCORPORATED v. KEITH D. ROBERTSON d/b/a K & S PRODUCE. PACA Docket No. RD-86-472. Decided October 21, 1986.

Respondent was ordered to pay complainant, as reparation, \$569.50 plus 13 percent interest per annum from September 1, 1985, until paid.

C. H. ROBINSON COMPANY v. HOUSTON PRODUCE DISTRIBUTING INC. a/t/a HOUSTON FRUIT & VEGETABLE COMPANY. PACA Docket No. RD-86-473. Decided October 21, 1986.

Respondent was ordered to pay complainant, as reparation, \$35,224.65 plus 13 percent interest per annum from September 1, 1985, until paid.

C. H. R. COMPANY v. BAKKER SALES INCORPORATED. PACA Docket No. RD-86-474. Decided October 21, 1986.

Respondent was ordered to pay complainant, as reparation, \$8,992.58 plus 13 percent interest per annum from October 1, 1985, until paid.

PEREZ RANCHES INC. a/t/a P. R. I. SALES CO. v. TRIPLE B PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-475. Decided October 21, 1986.

Respondent was ordered to pay complainant, as reparation, \$46,163.88 plus 13 percent interest per annum from March 1, 1985, until paid.

H. SMITH PACKING CORP *v.* FARM FOODS INC. PACA Docket No. RD-86-476. Decided October 22, 1986.

Respondent was ordered to pay complainant, as reparation, \$972.50 plus 13 percent interest per annum from January 1, 1985, until paid.

BUD ANTLE INC. *v.* FARLEY & CALFEE INC. PACA Docket No. RD-86-477. Decided October 22, 1986.

Respondent was ordered to pay complainant, as reparation, \$35,892.00 plus 13 percent interest per annum from February 1, 1986, until paid.

FRANK S. ECKET, III and WILLIAM R. SHERER d/b/a SKIP'S CONSOLIDATION *v.* TOC PRODUCE DISTRIBUTORS CORPORATION. PACA Docket No. RD-86-478. Decided October 22, 1986.

Respondent was ordered to pay complainant, as reparation, \$892.90 plus 13 percent interest per annum from October 1, 1985, until paid.

MAGNOLIA FRUIT & PRODUCE CO. INC. *v.* BERRYMAN PRODUCE INC. PACA Docket No. RD-86-479. Decided October 22, 1986.

Respondent was ordered to pay complainant, as reparation, \$3,902.00 plus 13 percent interest per annum from April 1, 1985, until paid.

PEMBERTON PRODUCE INC. *v.* WILBUR F. WILLIAMS d/b/a W. F. WILLIAMS COMPANY. PACA Docket No. RD-86-482. Decided October 22, 1986.

Respondent was ordered to pay complainant, as reparation, \$7,525.50 plus 13 percent interest per annum from July 1, 1985, until paid.

A. DUDA & SONS INC. v. JOHN E. REYNA d/b/a REYNA BROTHERS PRODUCE & TRUCKING. PACA Docket No. RD-86-483. Decided October 23, 1986.

Respondent was ordered to pay complainant, as reparation, \$5,151.75 plus 13 percent interest per annum from January 1, 1986, until paid.

SMITH POTATO INC. v. M & M PRODUCE INC. PACA Docket No. RD-86-484. Decided October 23, 1986.

Respondent was ordered to pay complainant, as reparation, \$3,852.50 plus 13 percent interest per annum from November 1, 1985, until paid.

GERALD LARSON d/b/a SPLIT DIAMOND L RANCH v. FARM PRODUCE OF IDAHO INC. PACA Docket No. RD-86-485. Decided October 23, 1986.

Respondent was ordered to pay complainant, as reparation, \$30,224.02 plus 13 percent interest per annum from May 1, 1985, until paid.

STEVCO INC. v. TOC PRODUCE DIST. CORP. PACA Docket No. RD-86-486. Decided October 23, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,016.40 plus 13 percent interest per annum from September 1, 1985, until paid.

GOOD YEAR PRODUCE INC. v. GREEN VALLEY CO. INC. PACA Docket No. RD-86-487. Decided October 23, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,992.90 plus 13 percent interest per annum from February 1, 1986, until paid.

SUNNYSIDE PACKING COMPANY *v.* VINCENT MAENZA BANANA CO. a/ t/a MAENZA & SONS. PACA Docket No. RD-86-488. Decided October 24, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,301.10 plus 13 percent interest per annum from October 1, 1985, until paid.

OSHITA MARKETING INC. *v.* INTERNATIONAL A. G. INC. PACA Docket No. RD-86-489. Decided October 24, 1986.

Respondent was ordered to pay complainant, as reparation, \$9,338.20 plus 13 percent interest per annum from March 1, 1986, until paid.

MEREX CORP. *v.* FRESHVILLE PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-490. Decided October 24, 1986.

Respondent was ordered to pay complainant, as reparation, \$31,965.15 plus 13 percent interest per annum from November 1, 1985, until paid.

HAYWOOD COUNTY COOPERATIVE FRUIT AND VEGETABLE ASSOCIATION INCORPORATED *v.* FLAMINGO PRODUCE SALES INC. PACA Docket No. RD-86-491. Decided October 30, 1986.

Respondent was ordered to pay complainant, as reparation, \$6,789.30 plus 13 percent interest per annum from September 1, 1985, until paid.

DULCE A. VITALE d/b/a TRANS WORLD CO. *v.* BEACON PRODUCE CO. PACA Docket No. RD-86-492. Decided October 30, 1986.

Respondent was ordered to pay complainant, as reparation, \$7,240.25 plus 13 percent interest per annum from September 1, 1985, until paid.

HALLMARK PRODUCE COMPANY *v.* KALECK DISTRIBUTING COMPANY.
PACA Docket No. RD-86-493. Decided October 30, 1986.

Respondent was ordered to pay complainant, as reparation, \$1,681.53 plus 13 percent interest per annum from June 1, 1985, until paid.

MERIT PACKING COMPANY *v.* AL NAGELBERG & Co. INC. PACA
Docket No. RD-86-495. Decided October 30, 1986.

Respondent was ordered to pay complainant, as reparation, \$39,084.80 plus 13 percent interest per annum from March 1, 1986, until paid.

SUNRISE RANCHES a/t/a SUNRISE SALES *v.* A & J FAMILY PRODUCE.
PACA Docket No. RD-86-496. Decided October 31, 1986.

Respondent was ordered to pay complainant, as reparation, \$18,411.48 plus 13 percent interest per annum from November 1, 1985, until paid.

BROAD ACRES *v.* RONALD L. COLLINS d/b/a KISSIMMEE FARM FRESH
PRODUCE. PACA Docket No. RD-86-498. Decided October 31, 1986.

Respondent was ordered to pay complainant, as reparation, \$8,800.00 plus 13 percent interest per annum from September 1, 1985, until paid.

COEXPORT INTERNATIONAL INC. *v.* C & C PRODUCE Co. INC., former-
ly: TRI-STATE PRODUCE Co. INC. PACA Docket No. RD-86-500. De-
cided October 31, 1986.

Respondent was ordered to pay complainant, as reparation, \$22,190.36 plus 13 percent interest per annum from June 1, 1985, until paid.

LEE H. ISAAK and ABE H. ISAAK d/b/a ISAAK BROS. v. AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-501. Decided October 31, 1986.

Respondent was ordered to pay complainant, as reparation, \$11,443.00 plus 13 percent interest per annum from September 1, 1985, until paid.

MISCELLANEOUS REPARATION DEFAULT ORDERS

NIKADEMOS DISTRIBUTING COMPANY, INC., v. BOLIVAR G. GAMEZ d/b/a ROBIL INTERNATIONAL. PACA Docket No. RD-86-295. New Docket No. 2-7295. Order issued September 10, 1986

Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. A Default Order was issued on June 18, 1986 awarding reparation to complainant in the amount of \$2,327.75. However, subsequent to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)). A Stay Order was issued on July 30, 1986.

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and respondent's answer is hereby ordered filed.

Copies of this order shall be served upon the parties. A copy of respondent's answer shall be served upon complainant, along with this order.

SPRING ACRES SALES COMPANY, INC., *v.* FRESHVILLE PRODUCE DISTRIBUTORS, INC. PACA Docket No. RD-86-361. Order issued October 6, 1986.

Donald A. Campbell, Judicial Officer

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$38,049.00 in connection with a transaction involving the shipment of sweet potatoes in interstate commerce.

A copy of the formal complaint was served on respondent, who failed to file a timely answer thereto and was thus in default. By letter dated July 29, 1986, respondent notified the Department that on April 25, 1986, complainant had filed in the Supreme Court of the State of New York, a complaint against respondent involving the same issues as this reparation proceeding. In a letter dated August 1, 1986, the Department gave complainant 15 days from its receipt of such letter to show that the state action had been dismissed without prejudice, or complainant would be deemed to have made an election of remedies pursuant to 7 U.S.C. § 499e(b), and its complaint would be dismissed. The letter was served on August 6, 1986, and complainant has failed to respond thereto.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

SIX L'S PACKING COMPANY, INC., *v.* BOLER FARMS. PACA Docket No. RD-86-362. Order issued October 6, 1986.

Donald A. Campbell, Judicial Officer

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on August 4, 1986, awarding reparation to the complainant in the amount of \$1,851.25. By letter received August 18, 1986, respondent has moved that this matter be reopened.

Accordingly, the order of August 4, 1986, is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant.

J.R. NORTON COMPANY *v.* M & M PRODUCE, INC. PACA Docket No. RD-86-393. Order issued October 6, 1986.

Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$950.00 in connection with a transaction involving the shipment of lettuce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated August 6, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of August 6, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

TOM LANGE COMPANY, INC., *v.* MELON PRODUCE INC. PACA Docket No. RD-86-398. Order issued October 23, 1986.

Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on August 28, 1986, awarding reparation to the complainant in the amount of \$95,331.50. By motion received September 23, 1986, respondent has moved that this matter be reopened after default.

Accordingly, the order of August 28, 1986, is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant, along with this order.

L.D. GREENE COMPANY v. PELICAN TOMATO CO. INC. PACA Docket
No. RD-86-367. Order issued October 27, 1986.

Donald A. Campbell, Judicial Officer

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside. Respondent has 10 days from its receipt of this order to file an original and two copies of its answer. Respondent's failure to file an answer in a timely fashion will result in the immediate issuance of a Default Order.

Copies of this order shall be served upon the parties.

INTERSTATE PACKING CO., v. PACIFIC FARM COMPANY. PACA Docket
No. RD-86-386. Order issued October 27, 1986.

Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that

good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 A.D. 790 (1957). Respondent apparently assumed, although wrongly, that its answer to the informal complaint was a sufficient response to the formal complaint. Under these circumstances, respondent's default in the filing of an answer should be set aside. Respondent will have 10 days from its receipt of this order to file an original and two copies of its answer to the formal complaint. Respondent's failure to file a timely answer will result in the immediate issuance of a Default Order.

Copies of this order shall be served upon the parties.

THE TOBI COMPANY, INC., *v.* UNITED PACKING CO. PACA Docket No. RD-86-306. Decided October 28, 1986.

Donald A. Campbell, Judicial Officer.

ORDER TO SHOW CAUSE

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Default Order was issued on July 1, 1986, awarding reparation to complainant in the amount of \$3,305.27. Respondent moved that the default be reopened and, on August 15, 1986, a Stay Order was issued, staying the Default Order and providing complainant with an opportunity to respond to the motion to reopen.

Complainant has submitted a letter in which it states that when it "submitted our formal complaint back in January 1986, it appears that it had been entered against the wrong licensee . . . the claim should have been filed against licensee Harkness-Colgate-Bartell d/b/a United Packing Company." Complainant appears to be requesting a dismissal of the complaint against respondent. Therefore, complainant will have 10 days from its receipt of this order to show cause why its complaint should not be dismissed. If a timely response is not made, we will assume complainant acquiesces to dismissal and will issue the appropriate order. Complainant should be aware that the filing of a reparation complaint against Harkness-Colgate-Bartell d/b/a United Packing Company will not be permitted if the filing date is in excess of nine months from when the alleged cause of action accrued. *Bianchi & Sons Packing Co. v. Kelvin S. Ng d/b/a Kin Yip Company*, 42 Agric. Dec. 292 (1983).

Copies of this order shall be served upon the parties.

MURAKAMI FARMS, INC., a/t/a MURAKAMI PRODUCE CO., v. M & M PRODUCE, INC. PACA Docket No. RD-86-437. Order issued October 28, 1986.

Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$7,133.75 in connection with a transaction involving the shipment of onions in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated August 21, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of August 21, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

FRANK CAPURRO & SON v. M & M PRODUCE, INC. PACA Docket No. RD-86-439. Order issued October 28, 1986.

Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$5,507.20 in connection with a transaction involving the shipment of produce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated September 5, 1985, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of September 5, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

In re: JOSE JAMIE SANCHEZ REYES. P.Q. Docket No. 209. Decided July 11, 1986.

William W. Weber, Administrative Law Judge.

Kris Ikejiri, for complainant.

Pro se, for respondent.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Plant Quarantine Act, as amended, (PQA) (7 U.S.C. § 151 *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged, *inter alia*, that respondent Jose Jamie Sanchez Reyes violated the PQA and section 319.27 of the regulations, promulgated thereunder (7 CFR § 319.27).

Copies of the complaint and the Rules of Practice governing proceedings under the PQA were served by the Hearing Clerk, by certified mail, upon the respondent.

Jose Jamie Sanchez Reyes was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegation and a waiver of such hearing. More than twenty (20) days have elapsed since Mr. Reyes was served with the complaint. Mr. Reyes has not filed an answer or any other document to date. This Default Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by Mr. Reyes's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Jose Jamie Sanchez Reyes, respondent herein, in an individual whose mailing address is 885 Given Street, San Diego, California 92154.

2. On or about March 30, 1985, the respondent imported from Mexico into San Diego, California, Mexican limes, in violation of section 319.27 of the regulations (7 CFR § 319.27), because the importation of Mexican limes is prohibited.

3. On or about March 30, 1985, the respondent imported from Mexico into San Diego, California, lemons, in violation of section 319.27 of the regulations (7 CFR § 319.27), because the respondent did not conform to the restrictions, as required.

CONCLUSION

The respondent has failed to file any answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By his silence, respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the PQA and regulations promulgated thereunder. The following Order is, therefore, issued.

ORDER

Respondent Jose Jamie Sanchez Reyes, is hereby assessed a civil penalty of five hundred dollars (\$500.00), which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Esq., Office of the General Counsel, Room 2422 South Building, Washington, United States Department of Agriculture, Washington, D. C. 20250-1400.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Default Decision and Order upon the respondent, unless there is an appeal within 30 days of service to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145)

[The Default Decision and Order became final on September 3, 1986.—Ed.]

In re: ARDLEY BALLIN CROSS, JR. P.Q. Docket No. 244. Decided September 5, 1986.

Dorothea A. Baker, Administrative Law Judge.

Clement McGovern, for complainant.

Ramino Estrada, Jr., San Antonio, Texas, for respondent.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act, as amended, (Act) (7 U.S.C. §§ 151-165 and 167) by a complaint filed

by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 319.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Ardley Ballin Cross, Jr., the respondent herein, is an individual whose mailing address is Route 9, Box 278 K, San Antonio Texas 78227.

2. On or about February 22, 1986, the respondent imported approximately fourteen (14) grapefruits, fourteen (14) tangerines and thirty three (33) oranges from Mexico.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of three hundred seventy five dollars (\$375.00). The respondent shall send, payable to the "Treasurer of the United States," a certified check or money order to Clement J. McGovern Esq., Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture.

ture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: NORTHWEST ORIENT AIRLINES. P.Q. Docket No. 157. Decided September 9, 1986.

Failure to present two pieces of baggage from Hawaii for inspection—Failure to file timely answer—Penalty.

The Judicial Officer affirmed Chief Judge Campbell's decision assessing a civil penalty of \$1,000 against respondent under the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations, because respondent failed to present two pieces of passenger baggage which were in its possession at Honolulu, Hawaii.

Donald A. Campbell, Judicial Officer.

Sherrie Kennedy, for complainant.

Mary McMunn, Northwest Airlines, for respondent.

DECISION AND ORDER

This is a proceeding under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-164a, 167), the Federal Plant Pest Act, as amended (7 U.S.C. § 150aa *et seq.*), and regulations promulgated thereunder (7 CFR § 318.13 *et seq.*), in which Chief Administrative Law Judge John A. Campbell (ALJ) filed an initial Decision and Order on January 31, 1986, assessing a civil penalty of \$1,000 against respondent after respondent failed to file a timely answer.

On March 5, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).¹ On August 26, 1986, the case was referred to the Judicial Officer for decision.

Based on a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, except that the effective date of the order is changed in view

¹ The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-164a and 167) and the Federal Plant Pest Act, as amended (7 U.S.C. § 150aa *et seq.*) (Acts) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint was filed with the Hearing Clerk on November 25, 1985. The complaint alleged that the respondent violated sections 318.13-10 and 318.13-12(a) of the regulations (7 CFR §§ 318.13-10 and 318.13-12(a)).

Copies of the complaint and the Rules of Practice governing proceedings under the Acts were served by the Hearing Clerk, by certified mail, upon respondent on December 3, 1985. On December 27, 1985, respondent was sent, by regular mail, a notice that its answer had not been received by the Hearing Clerk in the allotted time.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to deny or otherwise respond to the allegations in the complaint and request an oral hearing would constitute an admission of such allegations and a waiver of such hearing. More than twenty (20) days have elapsed since respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Northwest Airlines, Inc., respondent, is a business having its principal place of business at Office of the President, Executive Offices, Minneapolis-St. Paul International Airport, St. Paul, Minnesota 55111.

2. On or about June 1, 1985, the respondent violated sections 318.13-10 and 318.13-12(a) of the regulations (7 CFR §§ 318.13-10 and 318.13-12(a)) because respondent failed to present two (2)

pieces of passenger baggage, with Northwest Airline baggage claim tag numbers NW 211-845 and NW 211-846, which were in its possession at Honolulu Hawaii International Airport (Flight No. 22) and which were subject to inspection, for said inspection.

CONCLUSION

By reason of the facts in the finding of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following Order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to file an answer with the Hearing Clerk within 20 days after service of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 CFR §§ 1.136(a)-(c), .139):

§ 1.136 *Answer.*

(a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

(b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless

the parties have agreed to a consent decision pursuant to § 1.138.

* * * * *

§ 1.139 *Procedure upon failure to file an answer or admission of facts.*

The failure to file an answer, or the admission by the answer of all material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

The complaint in this case contained allegations identical in all material respects to the findings of fact, *supra*, and advised respondent that complainant was seeking a \$1,000 civil penalty. The complaint advised respondent that an answer must be filed with the Hearing Clerk within 20 days, as follows (Complaint at 2):

WHEREFORE, it is hereby ordered that for the purpose of determining whether or not respondent has, in fact, violated the Act and regulations promulgated thereunder, this complaint shall be served upon the respondent. The respondent shall have twenty (20) days after receipt of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250, in accordance with the applicable Rules of Practice (7 CFR § 380.1 and 7 CFR § 1.136). Failure to deny or otherwise respond to any allegation in this complaint shall constitute an admission of such allegation. Failure to file an answer within the time allowed therefor shall constitute an admission of the allegations in this complaint and a waiver of hearing.

In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent expressly advised respondent of the

effect of failure to file an answer with the Hearing Clerk within 20 days. The letter states:

In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and *three* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

The return receipt card shows that respondent was served with a copy of the complaint on December 3, 1985. Respondent's answer was, therefore, required to be filed with the Hearing Clerk by December 23, 1985. However, respondent filed nothing until over a month later, when it filed objections to complainant's motion for adoption of the proposed default decision. Since respondent failed to file an answer within the specified time period, the default Decision and Order was properly issued in this case. Although on rare occasions default decisions have been set aside for good cause shown or where complainant did not object,² respondent has shown no basis for setting aside the default decision here.³

² *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978), *In re Christ*, L.A.W.A. Docket No 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and see *In re Gallop*, 40 Agric. Dec. 217 (order vacating default decision) (case remanded to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981).

³ See *In re Schwartz*, 45 Agric. Dec. ____ (Aug. 12, 1986); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. ____ (July 9, 1986); *In re Gutman*, 45 Agric. Dec. ____ (June 17, 1986); *In re Daul*, 45 Agric. Dec. ____ (Mar. 6, 1986); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. ____ (Sept. 23, 1985); *In re Cutton*, 44 Agric. Dec. ____ (Aug. 20, 1985), *appeal docketed*, No. 85-1591 (D.C. Cir. Sept. 19, 1985); *In re Corbett Farms, Inc.*, 43 Agric. Dec. ____ (Nov. 1, 1984); *In re Jacobson*, 43 Agric. Dec. ____ (June 26, 1984); *In*

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 421 cases. The Department's Judicial Officer (who does not have a law clerk) disposed of 45 cases (including one on remand from the Seventh Circuit that required a 529-page decision to justify an 8-month suspension order and a \$10,000 civil penalty for 14 separate livestock violations based on circumstantial evidence). In a recent month, 66 new cases were filed with the Hearing Clerk. The Department does not have the time or resources to hold a hearing at this late date for this respondent, who did not file a timely answer and did not contest the allegations of the complaint in its untimely answer.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"⁴ If respondent were permitted to contest some of the allegations of fact at this late date, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to present matters by way of defense at this time.

Respondent's principal contention is that the alleged violation was not intentional, and that respondent "has demonstrated over the years a conscientious effort and intent to comply fully with all applicable regulations of the U.S. Department of Agriculture" (Letter of February 27, 1986, at 1). That defense, however, would not result in lessening the civil penalty in this proceeding, which is

re Buzun, 43 Agric. Dec. ____ (June 13, 1984); *In re Mayer*, 43 Agric. Dec. ____ (Apr. 12, 1984) (decision as to respondent Doss), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. ____ (Jan. 4, 1984); *In re Berhow*, 42 Agric. Dec. 764 (1983); *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order not set aside where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.* 39 Agric. Dec. 395, 396-97 (1980) (default order not set aside where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39 Agric. Dec. 370, 371 (1980); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

⁴ *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); *accord Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962).

in accord with the Department's settled sanction policy. *In re Lopez*, 44 Agric. Dec. ____ (Oct. 7, 1985); *In re Eastern Airlines, Inc.*, 44 Agric. Dec. ____ (Sept. 23, 1985) (\$2,000 civil penalty for two violations); *In re Esposito*, 38 Agric. Dec. 613, 622-65 (1979); *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974).

The inspection of passenger baggage moving from Hawaii, which is under quarantine, is necessary to ascertain whether baggage contains prohibited articles or plant pests. Such inspection is designed to prevent the spread of dangerous plant diseases and insect infestation. Unintentional violations could cause billions of dollars of damage and eradication expenses of tens of millions of dollars. *In re Lopez*, 44 Agric. Dec. ____ (Oct. 7, 1985).

For the foregoing reasons, the following order should be issued.

ORDER

Respondent is hereby assessed civil penalty of \$1,000, which shall be paid within 30 days after service of this order. This civil penalty shall be made payable to the "Treasurer of the United States," by certified check or money order, and shall be forwarded to Sherrie Kopka Kennedy, U.S. Department of Agriculture, Office of the General Counsel, Room 2422, South Building, Washington, D.C., 20250-1400.

In re: MERCEDES CAPISTRANO. P.Q. Docket No. 179. Decided September 9, 1986.

Importation of plantains from the Philippines in violation of the Act—Penalty.

The Judicial Officer affirmed Chief Judge Campbell's order assessing a civil penalty of \$250 against respondent for importing plantains from the Philippines into the United States in violation of the Act of August 20, 1912, as amended, and the regulations. This case is governed by *In re Lopez*, 44 Agric. Dec. ____ (Oct. 7, 1985), notwithstanding the fact that respondent's friend placed the prohibited plantains in respondent's luggage without respondent's knowledge.

Donald A. Campbell, Judicial Officer.

Jaru Ruley, for complainant

Pro se, for respondent.

DECISION AND ORDER

This is a proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167), in which Chief Administrative Law Judge John A. Campbell (ALJ) filed an initial Decision and Order on May 27, 1986, assessing a civil penalty of \$250 against respondent for

importing plantains from the Philippines into the United States in violation of the Act and regulations.

On July 8, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).¹ The case was referred to the Judicial Officer for decision on August 26, 1986.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation into the United States of fruits and vegetables from foreign countries and localities (7 CFR §§ 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 CFR §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted by a complaint filed on February 6, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about April 7, 1985, the respondent imported plantains into the United States at Seattle, Washington, from the Philippines, in violation of section 319.56(c) of the regulations (7 CFR § 319.56(c)), because the plantains were not imported under permit as required by section 319.56-2(e) of the regulations (7 CFR § 319.56-2(e)).

On February 21, 1986, the respondent filed an answer responding to and admitting the allegations contained in the complaint. This admission of the allegations contained in the complaint constitutes a waiver of hearing (7 CFR § 1.139).

Accordingly, the material allegations alleged in the complaint are adopted and set forth herein as the Findings of Fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 CFR § 1.139).

¹ The position of Judicial Officer was established pursuant to the Act of April 4 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1038 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

FINDINGS OF FACT

1. Respondent, Mercedes Capistrano, is an individual whose address is 115 Fairview Avenue, Apt. 26, Jersey City, New Jersey 07304.

2. On or about April 7, 1985, the respondent imported plantains into the United States at Seattle, Washington, from the Philippines, in violation of section 319.56(c) of the regulations (7 CFR § 319.56(c)), because the plantains were not imported under permit as required by section 319.56-2(e) of the regulations (7 CFR § 319.56-2(e)).

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated section 319.56(c) of the regulations (7 CFR § 319.56(c)).

Therefore, the following Order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

This case is governed by the principles set forth in *In re Lopez*, 44 Agric. Dec. ____ (Oct. 7, 1985), a copy of which is attached as an appendix.

There is a slight difference between the facts here and the facts in *Lopez*, viz., in *Lopez*, the respondent knew that he had one piece of sugarcane in his possession, but did not know that it was unlawful to bring it into the United States, whereas here, respondent's friend placed the prohibited plantains in respondent's luggage, without respondent's knowledge. However, that distinction is not material. As explained in *Lopez*, in order to achieve the congressional purpose and to prevent the importation into the United States of items that could be disastrous to the United States agricultural community, it is necessary to take a hard-nosed approach and hold violators responsible for any violation irrespective of lack of evil motive or intent to violate the quarantine laws. If that policy were not followed where forbidden items were placed in luggage by relatives or friends of the violator, a loophole would be created that could prove disastrous to American agriculture. Accordingly, the *Lopez* doctrine will be followed here, just as it was in the case of *In re Vallalta*, 45 Agric. Dec. ____ (June 17, 1986), in which respondent's relative placed a prohibited cacao pod in his luggage without his knowledge.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent, Mercedes Capistrano, is hereby assessed a civil penalty of \$250, which shall be payable to the "Treasurer of the United States," by certified check or money order, and it shall be forwarded to Jaru Ruley, Office of the General Counsel, Room 2422 South Building, U.S. Department of Agriculture, Washington, D.C. 20250-1400, within 30 days from the service of this order.

APPENDIX

In re Lopez, 44 Agric. Dec. ____ (Oct. 7, 1985).
[Excerpt omitted.—Ed.]

In re: NORTHWEST ORIENT AIRLINES. P.Q. Docket No. 131. Decided September 11, 1986.

Victor W. Palmer, Administrative Law Judge.

Joe Pembroke, for complainant.

Mary McMunn, Northwest Airlines, for respondent.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act, as amended, (Act) (7 U.S.C. §§ 151-165 and 167) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 318.13 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of

1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Northwest Orient Airlines, respondent is a corporation whose business address is Minneapolis-St. Paul International Airport, St. Paul, Minnesota 55111.

2. On or about July 26, 1986, the respondent transported approximately eight pieces of passenger baggage from Hawaii, to the United States mainland.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of the proceeding, such Order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of three hundred and fifty dollars (\$350.00). The respondent shall send, payable to the "Treasurer of the United States," a certified check or money order to Clement J. McGovern, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: MAHARLIKA MARKET. P.Q. Docket No. 212. Decided June 29, 1986.

Dorothea A. Baker, Administrative Law Judge.

Kris Ikejiri, for complainant.

Ladd Baumann, Agana, Guam, for respondent.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act, as amended (PQA) (7 U.S.C. § 151 *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged, *inter alia*, that respondent Maharlika Market violated the PQA and section 319.56 of the regulations, promulgated thereunder (7 CFR § 319.56).

Copies of the complaint and the Rules of Practice governing proceedings under the PQA were served by the Hearing Clerk, by certified mail, upon the Maharlika Market. Maharlika Market was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint. It was informed that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegation and a waiver of such hearing. More than twenty (20) days have elapsed since Maharlika Market was served with the complaint. Maharlika Market has not filed an answer, but, through counsel, filed a request for an extension of time to answer.* This Default Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by Maharlika Market's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Maharlika Market, respondent, is a company whose mailing address is P. O. Box 8544, Tamuning, Guam 96911.

2. On or about October 5, 1985, the respondent imported from the Philippines into Guam, approximately 20 pounds of longan fruit, in violation of section 319.56(c) of the regulations (7 CFR § 319.56(c)), because the importation from the Philippines into Guam of longans is prohibited.

CONCLUSION

The respondent has failed to file an answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By its silence, respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the PQA and regulations promulgated thereunder. The following Order is, therefore, issued.

ORDER

Respondent Maharlika Market, is hereby assessed a civil penalty of seven hundred fifty dollars (\$750), which shall be payable to

* This was denied. The time for the filing of a timely answer had expired

"The Treasurer of the United States", by certified or money order, and which shall be forwarded to Kris H. Ikejiri, Esq., Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of the Default Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Default Decision and Order became final on September 11, 1986.—Ed.]

In re: TRANSOCEANIC MARINE, INC. P.Q. Docket No. 272. Decided September 11, 1986.

William J. Weber, Administrative Law Judge.

Clement McGovern, for complainant.

Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912 as amended (21 U.S.C. §§ 111 and 120) and the Federal Plant Pest Act as amended, hereinafter "Act", (7 U.S.C. § 150aa *et seq.*), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Acts and regulations promulgated thereunder (7 CFR § 318.13 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision.

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Transoceanic Marine, Inc., respondent, is a corporation incorporated under the laws of the State of New York and having its principle place of business at 39 East 51st Street, New York, New York 10022.

2. On or about March 10, 1986, the respondent stored garbage aboard the M/V World Negotiator which was docked at the Wilmington Marine Terminal, Wilmington, Delaware.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of seven hundred and fifty dollars (\$750.00). The respondent shall send, payable to the "Treasurer of the United States," a certified check or money order to Clement J. McGovern Esq., Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: SABENA AIRLINES. P.Q. Docket No. 239. Decided September 25, 1986.

William J. Weber, Administrative Law Judge
Joe Pembroke, for complainant.
Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Act of August 20, 1903, as amended, (Act) (7 U.S.C. §§ 151-164a) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Sebena Airlines, respondent violated the Act and reg-

ulations promulgated thereunder (7 CFR § 319.56 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Sabena Airlines is a corporation whose business address is P.O. Box 20947, Hartsfield International Airport, Atlanta, GA 30320.

2. On or about July 16, 1985, respondent imported a shipment of corn salad leaves into Atlanta, Georgia from Belgium. (AWB 082/4374 2451)

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of three hundred and seventy-five dollars (\$375) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422, South Building, United States Department of

Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: TRANS WORLD AIRLINES, INC. P.Q. Docket No. 266. Decided September 29, 1986.

Dorothea A. Baker, Administrative Law Judge

Clement McGovern, for complainant.

Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Act of August 20, 1912, as amended, (Act) (7 U.S.C. §§ 159 and 162) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 319.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Trans World Airlines, Inc., the respondent herein, is a corporation doing business at John F. Kennedy International Airport, New York, New York, and whose attorney for purposes of service is Ms.

Mary McGuire Voog, Trans World Airlines, Inc., 605 Third Avenue, New York, New York 10158.

2. On or about February 20 and 23, of 1986, the respondent imported fresh vegetables and mushrooms into the United States from Italy.

3. On or about February 23, 1986, the respondent imported chicory into the United States from Italy.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of one thousand dollars (\$1000.00). The respondent shall send, payable to the "Treasurer of the United States," a certified check or money order to Clement J. McGovern Esq., Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: JESUS HERNANDEZ, P.Q. Docket No. 173. Decided August 18, 1986.

Edward H. McGrail, Administrative Law Judge.

Clement McGovern, for complainant.

Pro se, for respondent.

DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act, as amended (PQA) (7 U.S.C. § 151 *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged, *inter alia*, that respondent Jesus Hernandez violated the PQA and section 319.56-2(e) of the regulations, promulgated thereunder (7 CFR § 319.56-2(e)).

Copies of the complaint and the Rules of Practice governing proceedings under the PQA were served by the Hearing Clerk, by certified mail, upon the respondent.

Jesus Hernandez was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint. Mr. Hernandez has filed an answer, in which he admitted the material allegations of fact contained in the complaint. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 CFR § 1.139).

Accordingly, the material facts alleged in the complaint, which were admitted by Mr. Hernandez in his answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Jesus Hernandez, respondent herein, is an individual whose mailing address is 541 Delas Flores, Calexico, California 92231.

2. On or about July 5, 1985, the respondent imported four avocados in violation of section 319.56-2(e) of the regulations (7 CFR § 319.56-2(e)), because the importation of avocados from Mexico without a permit is prohibited.

CONCLUSION

The respondent has filed an answer in which he has admitted the material allegations contained in the complaint. The consequences of such an action were explained to the respondent in the Rules of Practice, a copy of which accompanied the complaint and letter of service. The admission by the answer of all the material allegations of fact contained in the complaint constitutes a waiver of hearing in accordance with § 1.139 of the regulations (9 CFR § 1.139).

By reason of the Findings of Fact set forth above, the respondent has violated the PQA and regulations promulgated thereunder. The following Order is, therefore, issued.

ORDER

Respondent, Jesus Hernandez, is hereby assessed a civil penalty of three hundred and seventy-five dollars (\$375.00), which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Clement J. McGovern, Esq., Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145

of the Rules of Practice applicable to this proceeding (7 CFR# 1.145).

[The Decision and Order became final on October 1, 1986.—Ed.]

In re: JESUS ALBERTO RENTARIA. P.Q. Docket No. 213. Decided June 24, 1986.

John A. Campbell, Administrative Law Judge.

Joe Pembroke, for complainant

Pro se, for respondent.

DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111 and 120), and the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-164a and 167) (Acts), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated regulations promulgated thereunder (9 CFR §§ 91.1 *et seq.* and 7 CFR § 319.27 *et seq.*). Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed within twenty days after service of the complaint, and that failure to file an answer would constitute an admission of the allegations in the complaint, under 7 CFR § 1.136(c). The respondent was also informed that failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 CFR § 1.139).

The respondent filed no answer during the twenty-day period allowed. Respondent's failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, under section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). Since respondent is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Jesus Alberto Renteria, respondent, is an individual whose address is 7631 North Loop #290, El Paso, Texas 79915.

2. On or about April 27, 1984, at Ysleta, Texas, the respondent imported twenty pounds of potatoes into the United States from Mexico in violation of 7 CFR §§ 321.4(a) and 319.56-2(e), because the respondent had neither applied for nor obtained a permit, as required.

3. On or about April 27, 1984, at Ysleta, Texas, the respondent imported three avocados into the United States from Mexico in violation of 7 CFR § 319.56-2(e), because the avocados were not accompanied by a permit, as required.

4. On or about April 27, 1984, at Ysleta, Texas, the respondent imported thirty eggs into the United States from Mexico in violation of 9 CFR §§ 92.2(a), 92.5(b)(1), 94.6(g), and 94.6(h), because the eggs were neither accompanied by a certificate, nor had respondent applied to the Deputy Administrator, Veterinary Services, for permission to import the eggs, as required.

CONCLUSION

The respondent has failed to file any answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By his silence respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and regulations promulgated thereunder. The following order is therefore issued.

ORDER

Respondent Jesus Alberto Renteria is hereby assessed a civil penalty of five hundred dollars (\$500), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Decision and Order became final on October 6, 1986.—Ed.]

In re: INVERSIONES REALTICO S.A., & RAM'S CARGO BROKERS, INC.
P.Q. Docket No. 252. Decided August 25, 1986.

Victor W. Palmer, Administrative Law Judge

Jaru Ruley, for complainant.

Pro se, for respondent.

DECISION AND ORDER

This is an administrative proceeding for the assessment of civil penalties for a violation of the regulations governing the importation into the United States of fruits and vegetables from foreign countries and localities (7 CFR §§ 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 CFR §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted by a complaint filed on May 19, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about August 12, 1986, the respondents imported yams and pumpkins into the United States at Miami, Florida, from Costa Rica, in violation of section 319.56(c) of the regulations (7 CFR § 319.56(c)), because the yams and pumpkins were not imported under permit as required by section 319.56-2(e) of the regulations (9 CFR § 319.56-2(e)).

The respondents failed to file answers in response to the complaint and, consequently, are deemed to admit the allegations contained in such complaint. (7 CFR § 1.136(c)). Respondent have, however, submitted payment of the civil penalties requested in the complaint.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 CFR § 1.139).

FINDINGS OF FACT

1. Respondent, Iversiones Realtico, S.A., is a foreign business located in San Jose, Costa Rica. Eddie Socarras is its agent in the United States with an address of 3055 N.W. 13th Street, Miami, Florida 33125.

2. Respondent, Ram's Cargo Brokers, Inc., is a corporation doing business at 3900 N.W. 79th Avenue, Suite 416, Miami, Florida 33166.

3. On or about August 12, 1985, the respondents imported yams and pumpkins into the United States at Miami, Florida, from Costa Rica, in violation of section 319.56(c) of the regulations (7 CFR § 319.56(c)), because the yams and pumpkins were not imported under permit as required by section 319.56-2(e) of the regulations (7 CFR § 319.56-2(e)).

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondents have violated section 319.56(c) of the regulations (7 CFR § 319.56(c)).

Therefore, the following Order is issued.

ORDER

The respondents, Inversiones Realtico, S.A. and Ram's Cargo Broker, Inc., are hereby assessed civil penalties of seven hundred fifty dollars each (\$750.00). This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Decision and Order became final on October 7, 1986.—Ed.]

In re: INTERNATIONAL AIR SERVICES. P.Q. Docket No. 220. Decided October 10, 1986.

Dorothea A. Baker, Administrative Law Judge.

Kevin Thiemann, for complainant.

Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111 and 120), the Federal Plant Pest Act, as amended (7 U.S.C. § 150aa *et seq.*), and the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-164a and 167) (Acts) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that International Air Services, Inc., respondent, violated the Acts and regulations promulgated thereunder (7 CFR § 330.100 *et seq.* and 9 CFR § 94.5 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in this complaint, admits to the Findings of Fact set forth below, and waives:

- (a) any further procedure;
- (b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;
- (c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. International Air Services, Inc., respondent, is a corporation doing business at Luis Munoz International Airport, Isla Verde, Puerto Rico 00913.

2. On or about July 17, 1985, the respondent removed two (2) bags of foreign origin garbage from a Guyana Airways Corporation aircraft, which had arrived at the Luis Munoz International Airport, Isla Verde, Puerto Rico, from Georgetown, Guyana.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of four hundred dollars (\$400.00) which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: VALLEY VIEW FARM. P.Q. Docket No. 273. Decided October 10, 1986.

John A Campbell, Administrative Law Judge.

Jaru Ruley, for complainant.

Pro se, for respondent.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151-164a and 167) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 319.56 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Valley View Farm, herein referred to as the respondent, is a corporation whose business mailing address is 119 Chrystie Street, New York, New York 10002.

2. On or about March 5, 1986, the respondent imported *moringa oleifera* (drumsticks) from the Dominican Republic into the United States at Jamaica, New York.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of six hundred dollars (\$600.00). The respondent shall send a certified check or money order for \$600.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: RENA LARIOS. P.Q. Docket No. 218. Decided September 10, 1986.

John Campbell, Administrative Law Judge.

Clement McGovern, for complainant

Pro se, for respondent.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing restrictions on entry of fruits and vegetables into the United States from certain foreign countries and localities (7 CFR § 319.56-2), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 CFR §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was initiated by a complaint filed on March 17, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about August 5, 1985, the respondent imported mangoes from Mexico that were not under permit.

On April 18, 1986, the respondent filed an Answer responding to and admitting the allegations contained in the Complaint. The ad-

mission of the allegations contained in the Complaint constitutes a waiver of hearing. (7 CFR § 1.139).

Accordingly, the material allegations contained in the Complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 CFR § 1.139).

FINDINGS OF FACT

1. Respondent, Rena Larios, is an individual with a mailing address of 3271 North Cornelia, Fresno, California 93711.

2. On or about August 5, 1985, the respondent imported from Mexico, approximately two (2) mangoes in violation of section 319.56-2(e) of the regulations (7 CFR § 319.56-2(e)) because the mangoes were not imported under permit, as required.

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated section 319.56-2(e) of the regulations (7 CFR § 319.56-2(e)).

Therefore, the following Order is issued.

ORDER

The respondent, Rena Larios, is hereby assessed a civil penalty of two hundred fifty dollars (\$250.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Clement J. McGovern, Office of the General Counsel, Room 2422-South Building., United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal within 30 days after service to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Decision and Order became final on October 20, 1986.—Ed.]

In re: SHIRLEY WILLIAMS DACO, P.Q. Docket No. 182. Decided September 9, 1986.

J. Campbell, Administrative Law Judge.

Kevin Thiemann, for complainant.

Pro se, for respondent.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation into the United States of fruits and vegetables from foreign countries and localities (7 CFR §§ 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 CFR §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted by a Complaint filed on February 6, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The Complaint alleged that on or about September 11, 1985, the respondent imported five (5) longans into the United States at Seattle, Washington from the Philippines, in violation of section 319.56(c) of the regulations (7 CFR § 319.56(c)), because the longans were not imported under permit as required by section 319.56-2(e) of the regulations (7 CFR § 319.56-2(e)).

On March 4, 1986, the respondent filed an Answer responding to and admitting the allegations contained in the Complaint. This admission of the allegations contained in the Complaint constitutes a waiver of hearing (7 CFR § 1.139).

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 CFR § 1.139).

FINDINGS OF FACT

1. Shirley Williams Daco, respondent, is an individual whose address is 145 Fleet Street, Vallejo, California 94591.

2. On or about September 11, 1985, the respondent imported five (5) longans into the United States at Seattle, Washington from the Philippines, in violation of section 319.56(c) of the regulations (7 CFR § 319.56(c)), because the longans were not imported under permit as required by section 319.56-2(e) of the regulations (7 CFR § 319.56-2(e)).

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated section 319.56(c) of the regulations (7 CFR § 319.56(c)).

Therefore, the following Order is issued.

ORDER

The respondent, Shirley Williams Daco, is hereby assessed a civil penalty of three hundred seventy-five dollars (\$375.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR # 1.145).

[The Decision and Order became final on October 24, 1986.—Ed.]

In re: MITSUI OSKLINE, LTD. P.Q. Docket No. 268. Decided September 12, 1986.

Dorothea A. Baker, Administrative Law Judge.

Cynthia Koch, for complainant.

Pro se, for respondent.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Federal Plant Pest Act, as amended, (FPPA), (7 U.S.C. § 150aa *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged, *inter alia*, that respondent Mitsui Oskline, Ltd., violated the FPPA and section 330.120 * of the regulations promulgated thereunder (7 CFR § 330.110). Copies of the complaint and the Rules of Practice governing proceedings under the FPPA were

* Corrected from 330.100 by the Administrative Law Judge.

served by the Hearing Clerk, by certified mail, upon Mitsui Oskline, Ltd.

Mitsui Oskline, Ltd., was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegation and a waiver of such hearing. More than twenty (20) days have elapsed since Mitsui Oskline, Ltd. was served with the complaint. Mitsui Oskline, Ltd., has not filed an answer or any other document to date. This Default Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

FINDINGS OF FACT

1. Mitsui Oskline, Ltd., respondent, is a company, whose address for purposes of service of process is, 1 World Trade Center, Suite 2211, New York, New York 10048.

2. The respondent is the registered owner of the motor vessel (M/V) *Michalis V*.

3. On or about December 29, 1985, at San Juan, Puerto Rico, the respondent violated section 330.110 of the regulations (7 CFR. § 330.110), because an inspector of the Plant Protection and Quarantine Programs had boarded the M/V *Michalis V* and applied seals to five boxes of foreign origin apples and oranges, and while under the custody of the respondent, the seals were broken without authorization, as required.**

CONCLUSION

The respondent has failed to file any answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By its silence, the respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the FPPA and regulations promulgated thereunder. The following Order is, therefore, issued.

** Complaint alleges "prohibited"

ORDER

Respondent Mitsui Oskline, Ltd., is hereby assessed a civil penalty of seven hundred fifty dollars (\$750.00), which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Thomas E. Bundy, Esq., Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Default Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer within 30 days, pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This Default Decision and Order became final October 24, 1986.—Ed.]

In re: RONALD BROWN. P.Q. Docket No. 67. Decided August 18, 1986.

Edward McGrail, Administrative Law Judge.

Joe Pembroke, for complainant.

Pro se, for respondent.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111, 120, and 122), Federal Plant and Pest Act, as amended, (7 U.S.C. §§ 150aa *et seq.*), and the Act of August 20, 1912, as amended, (7 U.S.C. §§ 161 and 162) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent has violated sections 111 and 120 of the Act (21 U.S.C. § 111 and § 120) and sections 330.400(b)(1) and 94.5(b)(1) of the regulations promulgated thereunder (7 CFR § 330.400(b)(1) and (9 CFR § 94.5(b)(1)).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served upon respondent on March 19, 1985, by regular mail in conformity with section 1.147(b)(3) of the Rules of Practice (7 CFR § 1.147(b)(3)).

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the com-

plaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegations and waiver of such hearing. More than twenty (20) days have elapsed since Respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Ronald Brown, is an individual whose mailing address is 720 Rosedale Avenue, Bronx, New York 10473.

2. On or about October 28, 1984, respondent, a Northwest Airlines employee removed from Northwest Airlines flight 18, garbage consisting of two pounds of grapes, three oranges and a persimmon, in violation of section 330.400(b)(1), (7 CFR § 330.400(b)(1)), and section 94.5(b)(1), (9 CFR § 94.5(b)(1)) because respondent failed to unload the foreign-origin garbage in tight, leak-proof covered receptacles, to an approved facility for incineration, sterilization or grinding, as required.

CONCLUSIONS

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following order is issued.

ORDER

Respondent is hereby assessed civil penalty of one hundred and fifty dollars (\$150) which shall be payable to the "Treasurer of the United States" by certified check and money order, and shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422 S. Bldg., United States Department of Agriculture, Washington, D. C. 20250, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days (7 CFR § 1.142(c)) after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer within 30 days pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Default Decision and Order became final on October 27, 1986.—Ed.]

In re: EUGENIA GOMEZ DE LOPEZ. P.Q. Docket No. 175. Decided August 20, 1986.

Edward McGrail, Administrative Law Judge.
Clement McGovern, for complainant
Pro se, for respondent.

DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act, as amended, (PQA) (7 U.S.C. § 151 *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged, *inter alia*, that respondent Eugenia Gomez de Lopez violated the PQA and section 319.56-2(e) of the regulations, promulgated thereunder (7 CFR § 319.56-2(e)).

Copies of the complaint and the Rules of Practice governing proceedings under the PQA were served by the Hearing Clerk, by certified mail, upon the respondent.

Eugenia Gomez de Lopez was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegation and a waiver of such hearing. More than twenty (20) days have elapsed since Mrs. Gomez was served with the complaint. Mrs. Gomez has not filed an answer or any other document to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by Mrs. Gomez's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Eugenia Gomez de Lopez, respondent herein, is an individual whose mailing address is Eduardo Conde 20-14 Santurle, Puerto Rico.

2. On or about November 8, 1985, the respondent imported for the Dominican Republic into San Juan, Puerto Rico, one pound of

okra, in violation of section 319.56-2(e) of the regulations (7 CFR § 319.56-2(e)), because the importation of okra from the Dominican Republic without a permit is prohibited.

CONCLUSION

The respondent has failed to file an answer in response to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By her silence, respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the PQA and regulations promulgated thereunder. The following Order is, therefore, issued.

ORDER

Respondent, Eugenia Gomez de Lopez, is hereby assessed a civil penalty of seven hundred fifty dollars (\$750.00), which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Clement J. McGovern, Esq., Office of the General Counsel, Room 2422 South Building, Washington, United States Department of Agriculture, Washington, D. C. 20250-1400.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Decision and Order became final on October 27, 1986.—Ed.]

In re: MOTORSHIPS, INC. P.Q. Docket No. 251. Decided September 10, 1986.

William J Weber, Administrative Law Judge.

Jaru Ruley, for complainant.

Pro se, for respondent.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the storage and disposal of garbage coming into the United States from certain foreign countries and localities (7 CFR § 330.400), hereinafter referred

to as the regulations, in accordance with the Rules of Practice in 7 CFR §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted by a complaint filed on May 19, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about October 21, 1985, the respondent unloaded regulated garbage in violation of the governing regulations.

On June 2, 1986, the respondent filed an Answer responding to and admitting the allegations contained in the Complaint. This admission of the allegations contained in the Complaint constitutes a waiver of hearing. (7 CFR § 1.139).

Accordingly, the material allegations contained in the Complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 CFR § 1.139).

FINDINGS OF FACT

1. Respondent, Motorships, Inc., is a business with a mailing address of P.O. Box 1157, Englewood Cliffs, New Jersey 07632.

2. On or about October 21, 1985, the respondent unloaded regulated garbage from aboard the vessel SW Atlantic Concert, which was docked at Elizabeth, New Jersey. This unloading was in violation of section 380.400(b)(1) of the regulations (7 CFR § 380.400(b)(1)) in that the regulated garbage was not unloaded under the direction of an Animal and Plant Health Inspection Service inspector and was not being moved to an approved facility for incineration, grinding, or sterilization, as required.

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated section 380.400 of the regulations (7 CFR § 380.400).

Therefore, the following Order is issued.

ORDER

The respondent, Motorships, Inc., is hereby assessed a civil penalty of two hundred fifty dollars (\$250.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after a full hear-

ing and shall be final and effective 35 days after service of this Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer within 30 days of service pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR # 1.145).

[The Decision and Order became final on October 28, 1986.—Ed.]

In re: HENRY ORRANTE. P.Q. Docket No. 174. Decided August 4, 1986.

Victor W. Palmer, Administrative Law Judge.

Clement McGovern, for complainant.

Pro se, for respondent.

DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Plant Quarantine Act, as amended, (PQA) (7 U.S.C. § 151 *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged, *inter alia*, that respondent Henry Orrante violated the PQA and section 319.56-2(e) of the regulations, promulgated thereunder (7 CFR § 319.56-2(e)).

Copies of the complaint and the Rules of Practice governing proceedings under the PQA were served by the Hearing Clerk, by certified mail, upon the respondent.

Henry Orrante was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegation and a waiver of such hearing. More than twenty (20) days have elapsed since Mr. Orrante was served with the complaint. Mr. Orrante has not filed an answer or any other document to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by Mr. Orrante's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Henry Orrante, respondent herein, is an individual whose mailing address is 1611 Tachivach Street, Palm Springs, California 92262.

2. On or about July 5, 1985, the respondent imported from Mexico into Calexico, California, several mangoes in violation of section 319.56-2(e) of the regulations (7 CFR § 319.56-2(e)), because the importation of mangoes from Mexico without a permit is prohibited.

CONCLUSION

The respondent has failed to file any answer to any of the allegations in the complaint. The consequences of such a failure was explained to the respondent in the complaint and in the letter of service that accompanied it. By his silence, respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the PQA and regulations promulgated thereunder. The following Order is, therefore, issued.

ORDER

Respondent, Henry Orrante, is hereby assessed a civil penalty of seven hundred fifty dollars (\$750.00), which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Clement J. McGovern, Esq., Office of the General Counsel, Room 2422 South Building, Washington, United States Department of Agriculture, Washington, D. C. 20250-1400.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[The Decision and Order became final on October 30, 1986.—Ed.]

In re: PESTKA ELEVATOR COMPANY. USWA Docket No. 86-1. Decided August 27, 1986.

Failure to increase warehouseman's bond—Failure to deliver corn and soybeans to CCC—Permanent revocation of license.

John Lom, for complainant.

Respondent, *pro se*

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF
DEFAULT

PRELIMINARY STATEMENT

This is a proceeding under the United States Warehouse Act, as amended (the Act) (7 U.S.C. 241 *et seq.*), instituted by a complaint filed by the Acting Administrator, Agricultural Stabilization and Conservation Service (ASCS), United States Department of Agriculture, charging that the respondent willfully violated the Act and regulations promulgated thereunder (7 CFR 735-743).

Copies of the complaint and Rules of Practice (7 CFR 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

1. Pestka Elevator Company is, and at all times material herein was, a Minnesota corporation which operates the Pestka Elevator, a grain warehouse located at Rural Route 3, (Box 81), Mapleton, Minnesota 56065.

2. The respondent has been licensed under the Act.

3. The regulations at 7 CFR 736.6(d) provide that no person may be licensed as a warehouseman unless he has allowable net assets to the extent of at least \$25,000 or 20 cents per bushel for the maximum number of bushels of grain storage capacity. The regulations also provide that in case of a deficiency in net assets above the minimum required by 7 CFR 736.6(d), the bond requirement shall be increased (7 CFR 736.14(c)).

4. The Act (7 U.S.C. 247) requires that the warehouseman post a bond in the amount required by the Secretary within the time required by the Secretary and provides for revocation of the warehouseman's license under the Act for failure to do so.

5. On or about April 22, 1985, respondent was requested by mail to increase the sum of the warehouseman's bond by no later than May 21, 1985, from \$52,000 to \$78,000 to cover a deficiency in allowable net worth. Respondent was again advised on or about June 10, 1985, by certified mail, that he had failed to respond satisfactorily to the letter of April 22, 1985, and did not provide the bond increase by the May 21, 1985 deadline.

6. On or about August 26, 1985, by leased wire, the license was temporarily suspended pending correction of financial conditions and correction of exceptions noted during an examination of the warehouse which occurred on July 29-30, 1985. The warehouseman was also advised that if corrective action was not completed and the licensing authority notified within 30 days of the date of the wire, action would be initiated to revoke the license. The warehouseman has failed to comply within the time allowed.

7. The Act (7 U.S.C. 262) requires the warehouseman to deliver agricultural products upon demand if such demand includes an offer to satisfy the warehouseman's lien and an offer to surrender the receipt.

8. On or about June 24, 1985, CCC issued a Loading Order to the respondent demanding shipment of 32,615.59 bushels of U.S. No. 2 yellow corn. The warehouse receipts were surrendered with the Loading Order along with an offer to pay storage through July 3, 1985, and also included an offer to pay loadout charges.

9. As of July 2, 1986, the warehouse was empty and the respondent had failed to deliver 13,704 bushels of U.S. No. 2 yellow corn and 8,417 bushels of soybeans to CCC.*

CONCLUSIONS

1. On February 6, 1986, the respondent was served a complaint filed by the Acting Administrator, ASCS, to permanently revoke respondent's license which was issued under the Act.

2. Respondent has failed to answer the complaint.

3. The regulations at 7 CFR 736.9 provide that a license issued to a warehouseman may be revoked, after an opportunity for a hearing, if the warehouseman has in any manner violated or failed to comply with any provisions of the Act or the regulations thereunder.

* This allegation of Fact was not set forth in the Complaint.

4. Pursuant to 7 U.S.C. 246, the violations alleged in paragraphs 1-9 of the Findings of Fact are grounds for the revocation of the U.S. Warehouse Act license issued to the respondent.

ORDER

1. The license issued under the Act to the respondent is hereby permanently revoked and any other license issued under the Act in which the respondent has any authority or financial interest is also revoked because of the violations as stated in paragraphs 1-9 of the Findings of Fact and paragraphs 1-4 of the Conclusions, above.

2. The provisions of this order shall become effective on the first day after this decision becomes final. Copies hereof shall be served upon the parties.

3. Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 CFR 1.130 *et seq.*).

[The Decision and Order Upon Admission of Facts by Reason of Default became final on October 9, 1986.—Ed.]

SEPTEMBER-OCTOBER 1986

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